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SUPREME COURT, U.S.

NO. 80-5122

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

CURTIS BROWNELL, Petitioner,

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF ILLINOIS

Mary Robinson, Deputy Defender
Mark Schuster, Assistant Defender
Office of the State Appellate Defender
63 Douglas Avenue
Suite 300
Elgin, Illinois 60120
(312)-695-8822

COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

I. Were petitioner's rights to silence and to counsel scrupulously honored when State authorities engaged in the functional equivalent of interrogation under Rhode Island v. Innis, ___ U.S. ___ (1980), after each of petitioner's assertions of his rights in a 36-hour period?

II. a) Was petitioner cloaked with a right to counsel when the state's attorney offered to give up his right to seek the imposition of the death penalty in exchange for petitioner's confession?

b) Was petitioner's right to counsel violated, under United States v. Henry, ___ U.S. ___ (1980), when the State deliberately created a situation likely to induce him to make an incriminating statement in the absence of counsel?

III. Did the prosecutor's decision to seek the imposition of a death sentence violate due process of law or the Eighth Amendment when he had promised not to do so if petitioner would confess, and petitioner confessed?

IV. Is the provision of a mitigating factor, "under the influence of an extreme mental or emotional disturbance, though not such as to constitute a defense to prosecution," unconstitutionally vague under the Eighth Amendment?

V. Does the provision that the death sentence hearing may be convened only "where requested by the State" grant to Illinois prosecutor's so absolute a discretion to call for the death sentence as to create a substantial risk that the death penalty in Illinois will be imposed in an arbitrary and capricious manner in violation of the Eighth Amendment?

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IN THE

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OCTOBER TERM, 1980

CURTIS BROWNELL, Petitioner,

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

The petitioner, Curtis Brownell, prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Illinois holding that his confession was properly obtained and that the Illinois death penalty statute does not violate the Eighth Amendment's proscription of cruel and unusual punishment.

OPINION BELOW

The opinion of the Supreme Court of Illinois was filed on March 21, 1980, and is reported at 79 Ill.2d 508, 404 N.E.2d 181.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on March 21, 1980. A petition for rehearing was denied by order of the Court on May 29, 1980 and this petition is being filed within sixty days of the Illinois Supreme Court's denial of rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the Constitution of the United States provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> No person shall...be compelled in any criminal case to be a witness against himself...

The Sixth Amendment to the Constitution of the United States provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to...have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No State shall...deprive any person of life, liberty, or property, without due process of law...

The provision for convening a capital sentencing hearing following an Illinois defendant's conviction for murder is found in Ill.Rev.Stat., 1977, Ch. 38, Sec. 9-1(d):

> (d) Separate sentencing hearing. Where requested by the State, the court shall conduct a separate sentencing proceeding to determine the existence of factors set forth in Subsection (b) and to consider any aggravating or mitigating factors as indicated in Subsection (c).

The provision for consideration of mitigating factors at the death sentencing proceeding is found in Ill.Rev.Stat., 1977, Ch. 38, Sec. 9-1(c):

> (c) Consideration of factors in Aggravation and Mitigation. The court shall consider, or shall instruct the jury to consider any aggravating factors which are relevant to the imposition of the death penalty. Aggravating factors may include but need not be limited to those factors set forth in subsection (b). Mitigating factors may include but need not be limited to the following:
>
> * * *
>
> 2. the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, although not such as to constitute a defense to prosecution;

STATEMENT OF THE CASE

Petitioner Curtis Brownell was charged by complaint on April 3, 1978, with the murder, aggravated kidnapping, and rape of Louise Betts in Boone County, Illinois (C. 2) The State's Attorney's information on these charges was filed on April 10. (C. 10) Betts had disappeared from Rockford, Illinois in September, 1977; her body was discovered in a field in Boone County on March 31, 1978. Petitioner was in custody in neighboring Winnebago County on that date, on charges of attempted murder, aggravated kidnapping and rape arising from an incident that also began in Rockford and ended in a remote area of Boone County. (R. 435-442) Counsel had been appointed for petitioner on the Winnebago County charges.

At 2:15 p.m. on March 31, petitioner interrupted the Boone County detective who was reading him the Miranda warnings and asked for his attorney to be present. (C. 353) The detective did not call petitioner's lawyer, but before leaving the room the detective displayed to petitioner a picture of Betts, asking petitioner if he recognized her. Petitioner "jerked back" and responded that he did not. (C. 353)

At 6:15 p.m. on March 31, petitioner stood in a lineup concerning a third offense, a Winnebago County battery, and met with counsel at that time. After the lineup, when counsel informed a detective form Winnebago county that petitioner would remain silent, the detective said, "Curt, you have a right to talk to the detectives either with or without your lawyers." (C. 366) After petitioner responded that he would remain silent, counsel was forced to cut off the detective when he nevertheless began to "bring up another matter" to petitioner. (C. 365-366) Petitioner presumed the question concerned the Betts killing. (C. 366)

On the next day, at about 6:00 p.m., Winnebago County detectives brought petitioner's wife to the jail because they believed petitioner had admitted the Boone County murder

to her. She agreed to talk to the authorities if she could meet with petitioner first. The state's attorneys and police agreed to arrange a visit. (C. 262-270) Counsel for petitioner, who was also acting as counsel for his wife, asked to see petitioner when he heard the arrangements she was making with the police. An assistant state's attorney from Winnebago County, the state's attorney of Boone County, and detectives from each county were now all present at the jail with counsel for petitioner, two Winnebago County public defenders. The Winnebago County assistant state's attorney ordered the jailkeeper to let counsel for petitioner "cool their heels awhile" when they announced they were going to see petitioner. (C. 347-349) Meanwhile, the detectives took petitioner's wife to the jail's visiting room to meet with petitioner. (C. 319)

When petitioner's lawyer observed him being led from the cell area of the jail toward the visiting room, he began to shout loudly and pound on the glass partition of the lawyer's visiting room in which he had been waiting for the past thirty minutes. (C. 348-349) Petitioner then broke away from the two jailers who were escorting him, ran to the attorney's room, and met with his attorney. (C. 298) Afterwards, he met with his wife. The visit left her "quite disturbed emotionally." Later, after she consulted another lawyer, she refused to tell the police anything. (C. 321-322)

Petitioner briefly met again with his lawyer (C. 274). A meeting between counsel and the two state's attorneys then occurred, and they offered not to seek the death penalty in Boone County if petitioner made a written confession to the murder charge. Counsel conveyed this promise to petitioner, and petitioner turned it down, reiterating that he wished to remain silent (C. 323-324, 370-373), but also stating that he wished more time to consider it. (R. 356)

After this conference with his attorney, petitioner was transferred into an isolation cell at the jail. (C. 371, 373-374) Petitioner described isolation as "much worse" than

his regular cell. "It is a place of solitude. There is no one you can see. There is a steel bed with a mattress on it and a toilet...there is a barred section from the floor to ceiling, a brick wall with a solid steel door on that." (R. 251, 374-375) Before this time, it had also been arranged for petitioner to have a visit with a clergymen, Rev. Dennison, at his request, although it was not normal to have someone visit an inmate at such time of the night. (C. 253-254)

When counsel relayed petitioner's decision to remain silent but to consider the "no death penalty" offer to the state's attorneys, the Winnebago County assistant state's attorney ordered his detective to return to petitioner's cell in the jail. Counsel for petitioner, and a Boone County detective, went with this detective. The detective again told petitioner that "although his lawyer had advised him not to talk to the police which was his right but if he changed his mind and wanted to talk to us with or without his Attorney being present, that was also his right." (C. 276-277) Counsel told the detective that petitioner had decided to remain silent, and petitioner affirmed so to the detective. (C. 357; 372) After additional but brief discussion between petitioner and his counsel, outside the presence of the detectives, the detective asked petitioner if he wished to speak to him right then. (C. 372) Petitioner stated that he yet needed more time to consider whether to change his decision to remain silent. (C. 346, 373)

All the parties then left the jail area; it was about 1:00 a.m. At about 2:00 a.m. petitioner asked the jailer to call the detectives back to the jail. When they arrived, petitioner specifically said he did not want his lawyer to be present and added that he had refused to take the deal offered him because he wanted "to burn." He signed a Miranda waiver form and confessed, stopping only after the detectives assured him that he had given them enough so he would "burn." (C. 277-279)

On this evidence, petitioner's pre-trial motion to

suppress written and oral statements, based on violations of his rights under the Fifth, Sixth, and Fourteenth Amendments, (C. 56-57) was granted in part and denied in part by the trial judge. The court suppressed evidence of showing petitioner the photographs on March 31, but found the April 2, 1978 statements to have been "given freely and voluntarily" by petitioner. (C. 79-80)

B.

At a bench trial on the charges in the circuit court of Boone County, the only evidence of a rape, the only evidence of an aggravated battery, and the only evidence of petitioner's connection with the alleged incident was his confession. Other evidence presented at the trial established the date of the girl's disappearance, the location and discovery of the remains of the girl's body on March 31, 1978, the meager findings of the pathologist, and the identification of the body by dental charts. No defense was presented.

C.

After the trial, the prosecutor called for the special sentencing procedure for imposing the death sentence. At the trial judge's insistence, pursuant to petitioner's pretrial motion, the state's attorney had declared before the trial began that "we will be asking the death penalty in this case..." (C. 650)

Prior to the hearing, petitioner filed a motion to strike and quash as unconstitutional the Illinois Death Penalty Statute, citing a number of grounds including "that the statute fails to set forth guidelines in directing under what conditions or cases the State's Attorney shall seek the death penalty [and] that it allows for a capricious and whimsical selection of people who may be subject to the possibility of the death sentence." (C. 110-112) The trial court denied the motion, specifically finding this ground "the most important question that has been raised by the Defendant here today..." and concluding that "the legislature

has devised a sound and rational manner of determining whether a death penalty should be imposed in certain circumstances..." (R. 646)

Petitioner's motion to strike the statute also maintained that it was unconstitutional because "the categories of aggravating and mitigating factors in Section 9-1 are impermissibly vague," specifically noting that "the enumerated mitigating factors are vague and without definition or guidelines." (C. 111) The trial judge denied the motion without specifically commenting on this allegation. (R. 646)

D.

At the hearing petitioner offered the testimony of two psychiatrists who adjudged him to be suffering from an extreme mental or emotional disturbance at the time the murder was committed. One found petitioner to be a schizophrenic person with multiple sexual deviations; the other concluded he suffered from a personality disorder, passive-aggressive type, with multiple sexual deviations. (R. 451, 477) The two psychiatrists who testified in rebuttal for the State reached similar conclusions; both found that Brownell suffered from a personality disorder, passive-aggressive type, with sexual deviation. (R. 499-505)

The reports of these four psychiatrists are also in virtual agreement on Brownell's background -- each relates a history of sexual abuse and intimidation which grossly alienated Curtis Brownell from human reality. (See People's Exhibits Nos. 57, 59 and Defendant's Exhibits Nos. 52, 54)

Despite this agreement on the facts underlying the case, the four witnesses reached disparate conclusions on the question of the existence of an extreme mental or emotional disturbance and its influence on petitioner at the time of the killing. The two defense witnesses testified that petitioner suffered from such a disturbance at the time the girl was murdered (R. 452, 480), while the two State witnesses concluded that he did not. (R. 499, 506)

None of the witnesses at the sentencing hearing defined

the term "extreme mental or emotional disturbance" for the court, or identified the critical element on which he disagreed with the others.

The sentencing judge concluded that he did not find "sufficient evidence to show such extreme mental or emotional disturbance did occur" from "carefully examining everything in the confession and everything that has been presented in the defense here." (R. 577) The judge believed that in order to find an extreme disturbance "some event must have occurred or the events that followed would not have occurred." (R. 577) The judge did not find such a triggering event, but found "to the contrary the sequence of events...indicates and shows to the Court that there was a deliberate methodical design in the acts that were committed...." (R. 577) The judge then imposed a sentence of death. (R. 580)

On appeal, the Illinois Supreme Court rejected petitioner's contentions that the admission of his confession against him violated both his right to silence under the Fifth and Fourteenth Amendments and his right to counsel under the Sixth and Fourteenth Amendments. People v. Brownell, 79 Ill.2d 508, 404 N.E.2d 181, 186, 188 (1980) (Appendix A p. 3, 6)

The Illinois Supreme Court also rejected petitioner's contenti n that the death penalty is precluded in Illinois because of the improper grant of prosecutorial discretion to prosecutors in Section 9-1(d) of the statute, 404 N.E.2d at 191 (Appendix A, p. 11). Without specifically addressing petitioner's contention that the mitigating factor "extreme mental or emotional disturbance" is unconstitutionally vague, the Court also upheld the lower court's finding that no extreme mental or emotional disturbance was proven at the sentencing hearing. 404 N.E.2d at 197 (Appendix A, p. 20) Nevertheless, because it held that the sentencing judge had improperly concluded as an aggravating factor that petitioner had murdered "an eyewitness against him," the court vacated the death sentence. Despite the rulings affirming the validity of the statute, the exercise of discretion against

petitioner when the State's Attorney of Boone County asked for a death sentence hearing, and the other findings of the sentencing judge at the death penalty hearing, the court remanded the cause for a new sentencing hearing. 404 N.E. 2d at 195 (Appendix A, p. 17)

The Court then allowed the filing of a supplemental issue attacking the prosecutor's decision to seek the death penalty after petitioner had confessed, even though the prosecutor had promised not to do so in exchange for the confession, in addition to a petition for rehearing. The petition for rehearing was denied and no discussion of the supplemental issue was added to the Court's original opinion. (Appendix B)

REASONS FOR GRANTING THE WRIT

I.

THIS CASE PRESENTS THE IMPORTANT QUESTION OF WHETHER THE STATE HAS SCRUPULOUSLY HONORED PETITIONER'S RIGHT TO CUT OFF QUESTIONING UNDER MICHIGAN V. MOSLEY, 423 U.S. 96 (1975), WHEN EACH TIME HE INVOKED HIS RIGHT TO COUNSEL OR TO SILENCE THE STATE ENGAGED IN THE FUNCTIONAL EQUIVALENT OF INTERROGATION UNDER RHODE ISLAND V. INNIS, ___ U.S. ___ (1980), THEREBY INDUCING HIS WAIVER OF THOSE RIGHTS.

In this case, state authorities engaged in a relentless, intentional course of conduct which they reasonably should have known was likely to induce petitioner to forego his previously invoked right to counsel and right to silence and then make an incriminating statement. The Illinois Supreme Court's sanction of this conduct, by its holding that the State "scrupulously honored" petitioner's assertion of his rights, People v. Brownell, 79 Ill.2d 508, 404 N.E.2d 181, 188 (1980) (Appendix A, p. 6), renders the safeguards of Miranda empty formalities, is directly opposed to this Court's ruling in Michigan v. Mosley, 423 U.S. 96 (1975), and is inconsistent with this Court's very recent decision in Rhode Island v. Innis, ___ U.S. ___, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980).

In Innis, this Court confirmed that interrogation of a suspect in custody encompasses more than merely express questioning. "The Miranda safeguards," this Court wrote, "come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." The term "interrogation" thus includes "any words or actions on the part of the police...that the police should know are reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 100 S.Ct. at 1689.

Additionally, Michigan v. Mosley established that "the admissibility of statements obtained after the person in custody had decided to remain silent depends under Miranda on whether his 'right to cut off questioning' was scrupulously honored." 423 U.S. at 104. It was critical in Mosley that the detectives "immediately ceased the interrogation and did not try either to resume the questioning or in any

way persuade Mosley to reconsider his position." 423 U.S. at 104. The Mosley Court also established the following policy: "To permit the continuation of custodial interrogation after a momentary cessation would clearly frustrate the purposes of Miranda by allowing repeated rounds of questioning to undermine the will of the person being questioned." 423 U.S. at 102.

Therefore, the Mosley Court recognized in a suspect in custody an "option to terminate questioning," a power which "counteracts the coercive pressures of the custodial setting." 423 U.S. at 103-104. With his option, the suspect "can control the time at which questioning occurs, the subjects discussed, and the duration of the questioning." 423 U.S. at 103-104. Only because the Mosley Court was not faced with police who "failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind" did it affirm the case. 423 U.S. at 105-106.

The record in this case, however, shows that the police did not scrupulously honor petitioner's rights, but continued the functional equivalent of interrogation after his every invocation of his rights, and persisted in repeated efforts to wear down his resistance and make him change his mind. Moreover, there is here every reason to believe that the State should have known that its interrogation of petitioner was reasonably likely to evoke the confession which petitioner ultimately gave.

On March 31, 1978, the day the body of Louise Betts was discovered in a field in rural Boone County, Illinois, petitioner Curtis Brownell was in custody in neighboring Winnebago County on other charges surrounding an attempted murder, aggravated kidnapping, and rape. Petitioner was represented by the Winnebago County Public Defender on those charges. On both March 31, and April 1, 1978, authorities from Boone and Winnebago Counties endeavored to interrogate

petitioner regarding the respective murder and attempted murder, as well as about a third matter, a battery.

The first interrogation occurred at 2:15 p.m. on Friday, March 31. Detectives from Boone County approached petitioner to question him about the Betts murder. Petitioner promptly invoked his right to counsel; nevertheless, the Boone County officers refused to call his lawyer, but displayed to him a photograph of the deceased girl and asked petitioner if he knew her. Petitioner "jerked back slightly" when he saw the picture and then said, "No."[1]

At 6:15 p.m. on March 31, his attorney now present, petitioner stood in a lineup on the Winnebago County battery matter. After the lineup, petitioner invoked his right to silence in the face of Winnebago County officer's efforts to question him about the case. Winnebago County detective Arbisi then told petitioner, "Curt, you have a right to talk to the detectives either with or without your lawyer. That is your decision." Petitioner said he would stand on his right to silence. Immediately, the detective then "started to bring up another matter," which petitioner "presumed" was the Betts murder case. Counsel for petitioner earnestly cut off this questioning, reiterating petitioner's invocation of his right to silence.

The next day, the Winnebago County detectives learned that petitioner may have confessed to his wife during a telephone call from the jail. When they approached her about it, she refused to say anything until after she had met with petitioner. Immediately, they took her to the jail and arranged a meeting. At the same time, the Winnebago County assistant state's attorney telephoned the jailer and ordered him to let counsel "cool his heels awhile" and to await

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[1] The Illinois Supreme Court found this continued interrogation of petitioner after invocation of his right to counsel to be a violation of his right to cut off questioning, citing Michigan v. Mosley, 423 U.S. 96 (1975). The Court below found no further violation of petitioner's rights, however.

his further directions. Only by counsel's loud shouting and banging on the glass partition of the attorney's visiting area to attract petitioner's attention, and petitioner's breaking from the escort of his jailers and running to his lawyer, was petitioner allowed to consult his attorney at this time.

Petitioner then met with his wife. When, after this meeting, she refused to discuss their conversation with the police, and because she also failed to persuade petitioner to come forward with a statement, the State's Attorney of Boone County next offered not to seek the death penalty in the resulting criminal prosecution if petitioner would confess. When petitioner stood on his right to silence, at the same time agreeing to consider the offer of leniency extended to him, he was transferred into an isolation cell for the night.

Sometime before this transfer to isolation, petitioner asked to see a clergyman, Rev. Dennison. The authorities called Rev. Dennison and arranged for him to visit petitioner at the jail, although of course regular visiting hours were over.

After his move to the isolation cell, one last time the Winnebago County assistant state's attorney directed the police to approach petitioner. Petitioner promptly stood on his right to silence, and again the police detectives told him that it was his right to speak to them without his lawyer being present. Counsel and petitioner then briefly conferred, and again the police detectives asked petitioner if he would talk to them.

In sum, at every turn in this case, every time petitioner asserted his rights, the State dishonored the assertion by continuing interrogation. Repeatedly, the State engaged in conduct, clearly directed at petitioner, by which it intended to induce him to abandon his reliance on his rights and to confess.

There can be no doubt that the State's Attorneys and

police should have known their deliberate conduct was reasonably likely to elicit an incriminating statement. The authorities here believed that petitioner recognized the deceased girl, after they improperly induced his recognition of her picture. They believed that he was inclined to unburden himself, after they learned that he had confessed to his wife over the telephone. They knew that she was reduced to tears after visiting with him in person, another indication that he had admitted his guilt. They knew also that he had asked to see a clergyman, a clear indication of a troubled conscience.

The tactics engaged in by the State -- displaying the photograph, asking petitioner to talk without his lawyer, arranging for him to meet with his wife before allowing him to meet with his lawyer, offering to forego the death penalty, again suggesting that petitioner meet with the police without his lawyer, and finally, putting petitioner into an isolation cell -- could only have been perceived by petitioner as one after another pressuring tactic to obtain his confession.

Innis firmly establishes that each of these tactics by the State amounted to interrogation. Such continued interrogation in the face of petitioner's steadfast invocation of his rights violates the clear command of Mosley.

Lastly, the Illinois Supreme Court's express reliance on the waiver of rights by petitioner just before he confessed at 2:00 a.m. on April 2nd is in error. The voluntariness of such a waiver must be judged under the totality of the circumstances, Fare v. Michael C., 442 U.S. 707 (1979), and the State bears a heavy burden of persuasion on the question. Brewer v. Williams, 430 U.S. 387, 402-406 (1977); Miranda v. Arizona, 384 U.S. 436, 475 (1966). All of the State's conduct on March 31 and April 1 cannot be divorced from the events at the final 2:00 a.m. meeting. More specifically, the State may not avoid the impact of its knowing conduct, meant to elicit a waiver, just because the desired waiver

was made in the end.

Thus, the Illinois Supreme Court may not justify its holding below on the ground that petitioner "said he understood his rights and signed a statement to that effect," 404 N.E.2d at 187, or because he "expressly declined to remain silent or to have counsel present [and] said the attorney would not permit him to say what he wished to say to the detectives." 404 N.E.2d at 188. The State deliberately undertook a course of conduct, clearly directly at petitioner which it knew would lead petitioner to waive his rights to counsel and to silence. In light of this conduct, the State cannot be heard now to claim that it has met its heavy burden of showing a voluntary waiver.

In summary, under this Court's holdings in Michigan v. Mosley, 423 U.S. 96 (1975) and Rhode Island v. Innis, ___ U.S. ___, 100 S.Ct. 1862, 64 L.Ed.2d 297 (1980), the State here violated the Fifth Amendment rights of petitioner. A writ of certiorari must issue to the Illinois Supreme Court to redress the erroneous decision of that Court in conflict with these decisions of this Honorable Court.

II.

A.

THIS CASE PRESENTS THE IMPORTANT QUESTION OF WHETHER AN ACCUSED MUST BE AFFORDED A SIXTH AMENDMENT RIGHT TO COUNSEL WHEN, DURING ITS INTERROGATION OF THE ACCUSED, THE STATE OFFERS TO GIVE UP ITS RIGHT TO SEEK THE IMPOSITION OF THE DEATH PENALTY IN EXCHANGE FOR THE ACCUSED'S CONFESSION.

Louise Betts disappeared in Rockford, Illinois on September 27, 1977 without a trace. The remains of her body were not discovered until the following March 31. The body had been left in the middle of a corn field in rural Boone County, out of sight from nearby roads. The record of this case reveals no witness to the abduction, no witness to the killing. In fact, no evidence at all was presented at trial which linked petitioner to the commission of the murder, outside of his confession to the killing.

In short, without petitioner's confession, the State had no evidence with which to prosecute him. State authorities thus engaged in a concerted course of conduct designed to induce petitioner to provide the needed confession. When other efforts had failed in this design, the State's Attorney of Boone County offered to surrender his statutory power to ask the trial court to impose a sentence of death upon petitioner, after criminal proceedings against him, if petitioner would confess to the murder.

Briefly, the State had previously displayed to petitioner a photograph of the deceased girl immediately after he had invoked his right to counsel; had then told him that he could talk to authorities without his lawyer being present; and had later arranged for petitioner's wife to meet with him after she told the authorities that she would persuade him to talk, at the same time ordering the jailers to keep petitioner's lawyer "cooling his heels awhile." All of these efforts to disengage petitioner from his lawyer, and to induce him to make an incriminating statement, had been fruitless before the Boone County State's Attorney made his offer.

Traditionally, the Sixth Amendment right to counsel

attaches "at least...at or after the time the judicial proceedings havd been initiated against [an accused] -- 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" Brewer v. Williams, 430 U.S. 387 (1977). Petitioner here was not under formal charge.

However, every policy which this Court has recognized for the application of the right to counsel to an accused justifies the extension of the right to petitioner.

In the past, this Court has expanded the application of the right to counsel under the Sixth Amendment "only when new contexts appear presenting the same dangers that gave birth initially to the right itself." United States v. Ash, 413 U.S. 300, 311 (1975). The recognized "core purpose" of the guarantee of the Sixth Amendment was "to assure 'Assistance' at trial when the accused was confronted with both the intricacies of the law and advocacy of the public prosecutor." 413 U.S. at 309. Hence, the guarantee has been limited to those "critical confrontations of the accused by the prosecution at pre-trial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality." United States v. Wade, 388 U.S. 218, 224 (1967).

The extension of the counsel guarantee of the Sixth Amendment has been limited only to situations arising after formal charge because, it is judged, "[i]t is then that a defendant finds himself faced with the prosecutorial forces of organized society and immersed in the intricacies of substantive and procedural law." Moore v. Illinois, 434 U.S. 220, 228 (1977). Moreover, "it is only [after a formal charge is filed] that the government has committed itself to prosecute, and only then that the adverse positions of government have solidified." Kirby v. Illinois, 406 U.S. 682, 689 (1972).

All of these considerations justify the application of a Sixth Amendment right to counsel to petitioner.

First, petitioner was clearly faced with "the prosecutorial

forces of organized society. He was in fact confronted by the concerted efforts of the state's attorneys of two different counties, and the detective squads of each as well.

Second, the adversary positions of the parties in this case were apparent from the very beginning of the investigation. The state's attorneys were only too aware of the fact that petitioner himself was the sole source of the evidence they needed to prosecute the offense. Without delay, the State authorities deliberately set out to extract this evidence from petitioner. These authorities believed that petitioner had recognized a photograph of the deceased girl. They knew that petitioner had been identified in neighboring Winnebago County as the assailant in a similar incident which had occurred in the same part of rural Boone County. They also believed that petitioner had admitted the killing to his wife. Surely, had they any firm evidence to back up these beliefs, the State would have filed a charge.

Moreover, the adverse position of the State was betrayed by the "advise" twice given to petitioner by one of the Winnebago County detectives. Detective Arbisi told petitioner on Friday evening and again on Saturday that he had the right to talk to the detectives with or without his lawyer being present when petitioner had invoked his right to silence through his lawyer. The second time Arbisi thus attempted to disengage petitioner from his counsel, he had been "instructed" to approach petitioner by an assistant state's attorney of Winnebago County. This repeated admonition to petitioner by the State makes it clear that the efforts to obtain a confession were not merely investigatory but were adversarial.

Finally, once the Boone County State's Attorney made his offer to forego the death penalty in exchange for petitioner's confession, the adverse positions of government and defendant were solidified. Because without a confession no prosecution was possible, petitioner held the power to prevent or at least limit the prosecution against himself. The State's

Attorney made it clear by his terms that if the petitioner would expend his power to thus control his prosecution for the offense, the prosecution would in turn surrender its power to seek the ultimate penalty against him. The offer went to the very heart of the adversary process, conviction or acquittal. There was at stake here not just another piece of evidence for use at petitioner's trial, but rather the State's entire case. Thus, the extension of this offer was not merely an investigatory step.

Moreover, the offer exposed a third justification for the extension of the right to counsel to this case. The offer made clear that the State was "committed to prosecute." Clearly, by the time he made the offer, the State's Attorney was troubling over only what penalty he might seek; it had to have been assumed that should he obtain the confession he would certainly prosecute.

Fourth, the offer raised up a number of intricate questions of substantive and procedural criminal law. Because petitioner held the power to define the prosecution against himself, it was essential that he be informed of the elements of the various charges against him. By not confessing at all, petitioner would have assured that he would not be prosecuted. On the other hand, by confessing to the killing alone, exposing no death penalty aggravating factors, petitioner would have assured at least that his life would not be taken. Petitioner was in need of the assistance of counsel to understand these options.

Moreover, the matter of his confessing also involved intricacies of the Illinois corroboration rule. In Illinois, the law demands corroborating proof that a crime did in fact occur before an individual who has confessed is punished for the act. People v. O'Neil, 18 Ill.2d 461, 165 N.E.2d 319 (1960). However, "it is enough if the [additional] evidence either tends to show that a crime did in fact occur or to corroborate the confession." People v. Holmes, 67 Ill.2d 236, 367 N.E.2d 663 (1977). Illinois is in the minority of jurisdictions which accepts proof

of corroborating facts of any sort whatever which tend to confirm the truth of the confession. 7 Wigmore, Evidence, (Chadbourn Revision, 1976), Sec. 2071, p. 396.

Thus, for example, although there was no extrinsic evidence of a rape in this case, the trial judge was justified in entering a conviction for rape where petitioner admitted such an act and the confession was otherwise shown to be believable. In exercising his power over his own prosecution, it would thus have been critical for petitioner to be well aware of this principle.

In addition, it would be important to petitioner's comprehension of the offer to clearly understand that the prosecutor alone holds the power to seek the imposition of the death penalty in Illinois. Under Illinois law, a death penalty sentencing hearing may be held only "where requested by the State." Ill.Rev.Stat. 1977, Ch. 38 Sec. 9-1(d). The assistance of counsel was needed for petitioner to comprehend these principles of Illinois law.

Finally, by the confession he ultimately gave, petitioner reduced the proceedings against him to a mere formality. The efforts of the State to obtain his confession, culminating in the State's Attorney's offer to forego the death penalty, completely settled petitioner's fate. Armed with petitioner's confession, the prosecution could not be headed. The trial was reduced to a mere formality of presenting corroborating evidence to instill a sufficient confidence in the trial judge that petitioner was just as guilty as he had admitted.

At the trial, testimony was presented about the girl's disappearance, about the discovery and the location of the remains of her body, about the meager findings of the pathologist who examined the body, and about the identification of the body by dental charts. There was no defense presented. The sole issue was the sufficiency of the corroboration of the confession. The confession had thus rendered the trial

a mere formality within the meaning of Wade.

It can not be overlooked in this case that, despite his promise, after petitioner disavowed the proferred deal at the time he confessed, the Boone County State's Attorney actually sought the imposition of the death penalty following trial.

The right to counsel means the accused has the right to have counsel acting as his "assistant," his "spokesman," or his "advisor." United States v. Ash, 413 U.S. at 312. In this case, when the State's efforts to disengage petitioner from his counsel had succeeded, when petitioner was left with no assistant, no spokesman, no advisor, he was grossly taken advantage of. The State's Attorney of Boone County obtained petitioner's confession to the alleged murder, which he used to successfully prosecute petitioner to a capital murder conviction, yet the State's Attorney obtained with the confession a disavowal of the proffered deal. No lawyer would have allowed such a surrender of advantage. At the very least, counsel would have assisted petitioner in securing the return benefit for the surpassing benefit he gave over to the State.

This is not to say that every accused must be afforded a Sixth Amendment right to counsel to protect him against the efforts of the State to secure his confession. This Court has made clear that generally, before formal charge, an accused is protected by no more than his Fifth Amendment right to the assistance of counsel in effectuating his privilege against self-incrimination. See Kirby v. Illinois, 406 U.S. 682, 689 (1972) and Rhode Island v. Innis, 100 S.Ct. at 1689, n. 4. The critical difference in this case is the State's offer not to seek the death penalty.

This offer of leniency would ordinarily render the voluntariness of any resulting confession, at the very least, highly suspect under the totality of the circumstances in which it was given. See Bram v. United States, 168 U.S. 532 (1897); cf. Brady v. United States, 397 U.S. 742 (1970). However,

this was no mere offer of leniency. This was an offer of the greatest possible sentencing benefit, a benefit which was solely within the power of the state's attorney to bestow. After all, "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one only of a year or two." Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (opinion of Stewart, J.). Thus, it is clear that petitioner was confronted with the most awesome power of the public prosecutor in this case -- the power to take his life.

Under all of the policies recognized by this Court, petitioner was entitled to the assistance of counsel for his defense. Only the lack of a formal charge stands between petitioner and his right. Yet in obtaining the critical confession, the prosecution here obtained the very evidence, the only evidence, it could use to bring the charge that would traditionally initiate petitioner's right. As soon as the State had the evidence, the formal charge was lodged, early Sunday morning, April 3.

As the record makes so clear, there was little for counsel to do once the charge was brought. Counsel could then advise petitioner of the intricacies of the substantive and procedural criminal law, but he had desperately needed to be aware of those before he confessed. The confession removed all the intricacies from petitioner's trial and reduced the actual proceedings to a mere formality. Only when the prosecutor requested a hearing for the imposition of the death penalty, an event which counsel surely would have precluded at the confession stage, were any intricacies cast upon the otherwise smooth proceedings in this case.

The writ of certiorari should be granted to confirm in petitioner a Sixth Amendment right to counsel in these circumstances.

B.

THE DECISION BELOW, THAT THE PETITIONER'S RIGHT TO COUNSEL WAS PROPERLY OBSERVED, IS IN CONFLICT WITH THE RECENT DECISION OF THIS COURT IN UNITED STATES V. HENRY, ___ U.S. ___ (1980), AND THE DECISION OF THE COURT OF APPEALS IN UNITED STATES V. MORRISON, 602 F.2d 529 (1979) (CERT. GRANTED).

In United States v. Henry, ___ U.S. ___, 100 S.Ct.___, ___ L.Ed.2d ___ (1980), this Court has only recently restated the rule that the government may not deliberately elicit an incriminating statement from a suspect who is under indictment and represented by counsel. ___ U.S. at ___. In Henry, the F.B.I. arranged for a paid informer "to be alert to any statements made by the federal prisoners" with whom he was housed, including Henry, who had been indicted and for whom counsel had been appointed. Because the contingent fee informer did not act solely as "a passive listener," but rather actively engaged Henry in conversations, the products of which were incriminating statements, it was held that the government had violated Henry's Sixth Amendment rights. This Court concluded:

> By intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the government violated Henry's Sixth Amendment right to counsel. This is not a case where ..."the constable blundered" [cite omitted]; rather, it is one where the "constable" planned an impermissible interference with the right to the assistance of counsel. ___ U.S. at ___.

In this case, the State also intentionally created a situation likely to induce petitioner to make an incriminating statement without the assistance of counsel. The State engaged in a deliberate course of conduct designed to induce petitioner to ignore his lawyer and to incriminate himself.

After the State's Attorney of Boone County offered to forfeit his right to seek a sentence of death against petitioner if he would confess, petitioner, through his attorney, stood on his right to silence but asked for more time to consider the offer. This response drew an immediate reaction.

First, petitioner was transferred to an isolation cell in the jail. Petitioner found his isolation cell to be

"much worse" than his regular cell. Moreover, Detective Arbisi said he ordered the transfer because he had overheard petitioner telling his attorney that he wished to "end it all tonight" and assumed a suicidal intention on the part of petitioner. This assertion, however, is clearly belied by the fact that Arbisi never told the jailers of his concern. Petitioner also confirmed that the remark was made to his lawyer, not to Arbisi, and made clear that it was made in terms of "clearing all this up" that night by confessing.

Second, the assistant state's attorney of Winnebago County, when he was informed that petitioner wished more time to consider the offer, "instructed" Arbisi to approach petitioner once more. Arbisi went back to the jail and spoke with petitioner outside his cell, to advise him that he need not adhere to his attorney's advice, but instead could decide on his own to meet with and talk to the investigating detectives at any time.

Petitioner responded by re-asserting his right to silence, and then conferred briefly with his lawyer, who was also present. When they had finished, as petitioner walked past Arbisi back toward his cell, Arbisi asked him, "Do you want to talk to me now?" Petitioner again declined and was returned to isolation.

This pattern of conduct closely follows that condemned in United States v. Morrison, 602 F.2d 529 (3rd Cir. 1979), cert. granted, 27 Cr. Law Rptr. 4122. In Morrison, D.E.A. agents visited the defendant at her home, without the knowledge or consent of her attorney, after her indictment. They asked her about the source of her drug supply; they told her they could make sentencing recommendations; they informed her of government plans for protection of informers. They also told her that they doubted the capabilities of her attorney, and urged her to obtain the services of a public defender if she wished to cooperate with them. 602 F.2d at 530-531. One of the agents returned unannounced each of the

following two days; Morrison refused to see him the first time, but the second day she listened as he "repeated the statements he made during his first visit." 602 F.2d at 531.

In this setting, the Third Circuit Court of Appeals condemned the actions of the Government. "The challenged conduct represents not only an 'inadequately justified' but a thoroughly unjustified and wrongly motivated interference with the attorney-client relationship, and constitutes a violation of the defendant's Sixth Amendment right to effective assistance of counsel," the Court concluded. Because "the deliberate undermining of constitutional rights must not be countenanced," the Court dismissed the charges against Morrison. 602 F.2d at 533.

This Court's grant of the writ of certiorari in the case was limited to the propriety of the relief granted. Thus, that the conduct in Morrison represents a deliberate attempt to destroy the attorney-client relationship represented is not being challenged.

The State's deliberate attempt to destroy the attorney-client relationship in this case must similarly be condemned. As in Morrison, "the actual conduct, its motivation, its intended effect, and its pointed intrusiveness are readily apparent" in this case. 602 F.2d at 533.

It can not be overlooked that the State had interfered with the attorney-client relationship in this case even before the offer by the Boone County State's Attorney. The authorities here had refused to call in petitioner's lawyer, and instead displayed to him a photograph of the deceased girl and asked if he recognized her. They had previously told him to ignore his attorney and speak to them without him. When counsel had desired to see petitioner when he knew the authorities were arranging a visit with his wife, who had promised that petitioner would speak to them after the visit, the authorities instructed the jailers to let counsel "cool his heels awhile" before seeing petitioner.

Nor can it be overlooked that petitioner here was in

custody. This Court noted in United States v. Henry, ___ U.S. at ___ that custody was a critical factor in determining whether the State has deliberately created a situation likely to induce a suspect to make an incriminating statement. "The mere fact of custody imposes pressures on the accused... [and] confinement may bring into play subtle influences that will make [the suspect] particularly susceptible to the ploys of [the government]." ___ U.S. at ___.

Lastly, the decision of the court below that petitioner's right to counsel was "properly observed" because he was given the opportunity to call in his attorney, and expressly declined to do so just before he confessed, can not be approved. The State may not be rewarded for its interference with the attorney-client relationship. That the State's efforts to disengage petitioner from his lawyer succeeded in so short a time is ample evidence of their efficacy, and strong reason to condemn the State's behavior despite the resulting "waiver" of counsel by petitioner.

In sum, the State in this case has deliberately created a situation likely to induce petitioner to make an incriminating statement without the presence of counsel. In the face of his reliance on the advice of his lawyer, the police transferred him to an isolation cell, removed him from the cell to insist to him that he had the right to speak to them without the presence of counsel, and then solicited his cooperation as they returned him to the cell. This is a deliberate attempt to destroy the existing attorney-client relationship between petitioner and his lawyer which is intolerable under the Sixth Amendment. A writ of certiorari must issue to review the contrary decision of the Illinois Supreme Court, in conflict with the recent decision of this Court in United States v. Henry, ___ U.S. ___, 100 S.Ct. ___, ___ L.Ed.2d ___ (1980) and the Circuit Court of Appeals' decision in United States v. Morrison, 602 F.2d 529 (3rd Cir. 1979), cert. granted, 27 Cr. Law Rptr. 4122.

III.

THIS CASE PRESENTS THE IMPORTANT QUESTION NOT YET DECIDED BY THIS COURT OF WHETHER A PROSECUTOR, ABSENT GOOD REASON, HAVING OBTAINED PETITIONER'S CONFESSION MAY IN HIS DISCRETION REQUEST A DEATH SENTENCE HEARING AFTER PROMISING NOT TO DO SO IF PETITIONER WOULD CONFESS.

In Santobello v. New York, 404 U.S. 257 (1971), it was established that in any case where a guilty plea "rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." 404 U.S. at 262.

In Santobello, the prosecution had promised to refrain from making any sentencing recommendation in exchange for defendant's guilty plea. This Court felt that "the adjudicative element inherent in accepting a plea of guilty" must be "attended by safeguards to insure defendant what is reasonably due in the circumstances." 404 U.S. at 262. "The interests of justice" and "appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty" required granting Santobello relief. 404 U.S. at 262.

The Santobello decision rests on fundamental fairness, a notion included in Due Process of law under the Fifth and Fourteenth Amendments. The instant case, however, involves a heightened notion of due process. This is a capital case. It is not conceded by this Court that "whatever process is 'due' an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case." Reid v. Covert, 354 U.S. 1, 77 (1957) (Harlan, J. concurring). This Court's recent decision in Beck v. Alabama, ___U.S.___, 100 S.Ct.___, __L.Ed. 2d___(1980), confirms Mr. Justice Harlan's statment. In Beck, defendant was found guilty at a capital trial in which he was not allowed to propose instructions to his jury regarding lesser included offenses. Although this Court had never held "that a defendant is entitled to a lesser included instruction as a matter of due process," since "the failure to give the jury the 'third option' of conviction on a lesser included offense would seem inevitably

to enhance the risk of an unwarranted conviction," a risk that "cannot be tolerated in a case in which the defendant's life is at stake," this Court held Beck entitled to instruct the jury. ___U.S. at ____.

In this case, both due process under the Fifth and Fourteenth Amendments and consideration of cruel and unusual punishment under the Eighth and Fourteenth Amendments require that no death penalty proceeding be held. The order of the Illinois Supreme Court remanding this case for a new sentencing hearing is in error and must be reviewed by this Honorable Court to square it with the principles of Santobello and Beck.

In this case the prosecution was faced with an inability to prosecute the offense absent a confession from petitioner. Without his confession, there was no evidence which linked petitioner to the offense. The deceased girl disappeared in September, 1977 without a trace, the remains of her body were not found until March, 1978. No cause of death could be determined. There were no witnesses to the alleged abduction and killing.

Under these circumstances, the Boone County State's Attorney offered not to seek the death penalty against petitioner if he would confess. At the time he made the offer, the State's Attorney had no basis to presume the death penalty would even be possible in the case. Petitioner twice asked for time to consider the offer, but within three hours had agreed to give his confession.

Inexplicably, petitioner did not demand the proffered quid pro quo before he gave over his confession. He told his interrogators instead that he "wanted to burn."

Despite his outstanding offer, the State's Attorney accepted petitioner's rejection and, his discretionary power over the death sentence restored by petitioner's guilt-ridden, suicidal wishes, promptly requested a death penalty hearing after trial.

No less than in Santobello, the interests of justice and appropriate recognition of the duties of the prosecution in

exercising its discretion in asking for a death sentence in Illinois require that relief be accorded petitioner here. No less than in Beck, the enhanced process due to a capital defendant requires that this prosecutor honor his surrender of his statutory, discretionary power to ask for a sentence of death when petitioner has delivered over the confession the prosecutor's concession was meant to induce.

Petitioner's purported disavowal of the proffered deal is of no account in this matter. To focus only on petitioner's "rejection" of the deal would be to import the rules of contract law into criminal law, and to elevate those rules over the important constitutional principles at stake. Compare Brewer v. Williams, 430 U.S. 387, 401 n.8 (1977) ("It is argued that [the agreement not to interrogate Williams] may not have been an enforceable one. But we do not deal here with notions of offer, acceptance, consideration, or other concepts of the law of contracts. We deal with constitutional law.")

Thus, it is solely the State's Attorney's exercise of his discretion that is under scrutiny here. The desire of petitioner "to burn" for his crimes must have no bearing on that exercise. Here, when he made the offer, the prosecutor had determined that society's need to gain the evidence necessary to prosecute petitioner at all outweighed its need to exact the ultimate punishment. Compare Gregg v. Georgia, 428 U.S. 153, 225 (1976) (opinion of White, J.) ("[P]rosecutors will be motivated in their charging decision by...the strength of their case....Thus defendants will escape the death penalty through prosecutorial charging decisions...because the proof is insufficiently strong."). The prosecutor's decision, once made, should not be retractable, at least absent good reason. "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358 (1977).

The record in this case reveals no reason for the prosecutor's about-face. None of the elements of his original exercise of discretion changed between the time he decided to give up his death sentence power for the confession and the time he used his power in requesting the death penalty hearing. Indeed, he had only received the indispensable confession he had decided to bargain for, and used it most successfully in securing petitioner's conviction. No caprice or emotion of the Boone County State's Attorney, nor indeed, petitioner's own emotional desire "to burn" at the time he confessed, may justify the State's Attorney's reversal of position in this case.

Therefore, petitioner asks that a writ of certiorari issue to resolve the important question presented in this case of whether a prosecutor, absent good reason, having obtained petitioner's confession may in his discretion request a death sentence hearing after promising not to do so if petitioner would confess.

IV.

THIS CASE PRESENTS THE IMPORTANT QUESTION OF WHETHER THE PROVISION OF THE ILLINOIS DEATH PENALTY ACT, "UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE, ALTHOUGH NOT SUCH AS TO CONSTITUTE A DEFENSE TO PROSECUTION," IS UNCONSTITUTIONALLY VAGUE UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

Section 9-1(c)(2) of the Illinois Death Penalty Act provides that the sentencing authority shall consider in mitigation of imposition of the death sentence that "the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, although not such as to constitute a defense to prosecution." Ill. Rev. Stat., 1977, Ch. 38, Sec. 9-1(c)(2).

The Illinois Death Penalty Act provides no definitions of the vague terms of this statute. Yet, this Court has held that a state "must channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance and that make rationally reviewable the process for imposing a sentence of death." Godfrey v. Georgia, ___U.S.___, 100 S.Ct. 1759,1764-1765, 64 L.Ed.2d 398 (1980). Standards that are too vague thus violate the command of Furman v. Georgia, 408 U.S. 238 (1972), that no death penalty procedure may create the risk that punishment will be inflicted in an arbitrary and capricious manner.

Thus, part of the State's obligation is "to define the crimes for which death may be the sentence in a way that obviates 'standardless [sentencing] discretion.'" Godfrey v. Georgia, 100 S.Ct. at 1764. Godfrey specifically held that an aggravating factor, described only as "outrageously or wantonly vile, horrible, or inhuman," is unconstitutionally vague under the Eighth and Fourteenth Amendments. This Court held that "there is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." 100 S.Ct. at 1765. Without any guiding instruction for the sentencing authority, the sentencer's interpretation of this factor "can only be the subject of sheer speculation." 100 S.Ct. at 1765. The sentencer's decision, then, can not be reviewed rationally: "[t]here is no principled way to distinguish

this case, in which the death penalty was imposed, from the many cases in which it was not." 100 S.Ct.at 1767.

The converse of this rule applies to the mitigating factors which must be considered by the sentencer at the death penalty hearing. Part of the State's obligation is to carefully define the offenses for which a death penalty may be imposed, 100 S.Ct. at 1764; but the State must also not "create the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett v. Ohio, 438 U.S. 586, 605 (1978). The obligation of the State is to provide "clear and objective guidelines" for the entire death penalty procedure. The decision to impose the penalty, that is, the decision that the aggravating factors outweigh the mitigating factors, is the decision which must be "rationally reviewable."

The term "extreme mental or emotional disturbance" in the Illinois Death Penalty Act does not give sufficient guidance to the sentencer. Nothing in the provision puts an inherent restraint on the arbitrary or capricious rejection of the mitigating factor. Thus, the statute creates the risk that the death penalty will be imposed despite a factor which may call for a less severe sentence. Under Godfrey v. Georgia and Lockett v. Ohio, the term is unconstitutionally vague.

It has long been recognized that a vague law "impermissibly delegates basic policy matters to judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972). The risk of arbitrary and discriminatory application of a death penalty law is especially forbidden. Furman v. Georgia, 408 U.S. 238 (1972).

It is also clear that a vague law raises up the danger identified in Gardner v. Florida, 430 U.S. 349 (1977), that the sentencing court will be deprived of the "participation of

counsel [important] to the process of evaluating the relevance and significance of aggravating and mitigating facts." 430 U.S. at 360. The Gardner Court recognized that "consideration must be given to the quality, as well as the quantity, of the information on which the sentencing judge may rely." 430 U.S. at 359. Debate between the adversaries is "essential" to this process. 430 U.S. at 360. No meaningful debate may occur when the ultimate decision is shrouded in the personal and private understanding of the factor by the judge.

The four Illinois cases raising a question regarding this factor which have been presented to the Illinois Supreme Court confirm the existence of a vagueness problem. In People v. Greer, 79 Ill.2d 103, 402 N.E.2d 203 (1979), the Illinois Attorney General on appeal confessed error on the trial court's determination that there was no extreme mental or emotional disturbance present in the case. The Attorney General thus superimposed his own interpretation of the provision upon the considerations of the sentencing judge and concluded on his own that "the General Assembly did not intend to impose a death penalty in a case such as Alan Greer's." (Brief of plaintiff-appellee, p. 97) Although a confession of error does not bind the Illinois Supreme Court and the question was not decided as the court reversed on other grounds, 402 N.E.2d at 209, the Attorney General's confession bespeaks the vagueness in the provision.

In People v. Carlson, 79 Ill. 2d 564, 404 N.E.2d 233 (1980), the Illinois Supreme Court, without offering any objective guidelines, ruled that the judge below had erred in rejecting the notion that defendant acted under the influence of an extreme mental or emotional disturbance. The judge below had discounted evidence that defendant had been attempting suicide at the time of the shooting and that he had undergone a physical (two heart attacks) and emotional (loss of affection of his wife) deterioration in the year or

two prior to the shooting. The Illinois Supreme Court overruled the judge below, found that defendant was suicidal and extremely distraught when the murder occurred, and vacated the death sentence. 404 N.E.2d at 244-245.

In the third case, People v. Walker, No. 51989 (orally argued May 14, 1980), the trial court said at the sentencing hearing that he was "desperately searching for" the meaning of the word "extreme" in the statute. The court inquired of a witness, "[C]an you give the Court any guidance, direction, standard, or anything that would help for this Court to determine what is an extreme mental or emotional disturbance?" (Brief of defendant-appellant, p. 172). The witness then told the court that extreme meant "severe," which meant "a severely disturbed person...one who is almost continuously disturbed without any lucid intervals of rationality at all." (Brief of defendant-appellant, p. 173). Although this definition far too closely describes insanity, a defense to prosecution in Illinois, Ill.Rev.Stat., 1977, Ch. 38, Sec. 6-2, to be proper under the Illinois Death Penalty Act, the trial judge nevertheless relied on it for "some guidance" in deciding the issue. Defendant Walker has argued to the Illinois Supreme Court that the mitigating term is vague without judicial gloss; and he has urged the court to impose on the provision the gloss put on the same or similar term in Florida, Arizona, Arkansas and Ohio in support of his contention that, so explained, the evidence presented at his sentencing hearing establishes an extreme mental or emotional disturbance at the time of the offense. Briefly, that evidence revealed a history of alcohol and drug abuse, and heavy use of alcohol and some use of mescaline on the day in question. (Brief of defendant-appellant, pp. 177-188).

Lastly, in this case, the trial judge heard and considered the testimony of four psychiatrists on the issue of the

existence of this mitigating factor. Two concluded that petitioner suffered from an extreme mental or emotional disturbance at the time of the murder; two concluded that he did not. Remarkably, the psychiatrists agreed on all of the data underlying their respective, disparate conclusions. Yet none of the witnesses defined the elements which would make up an extreme mental or emotional disturbance, or identified the critical element on which they disagreed. The judge decided there was no extreme disturbance because he found "a methodical design" and no specific precipitating event. The Illinois Supreme Court affirmed, finding the judgment "supported by the evidence." People v. Brownell, 79 Ill. 2d 508, 404 N.E.2d 181, 197 (Appendix A., p. 19-20). Thus, the Court has yet to outline the principles by which to judge the evidence in the first instance.

The problem exhibited in all these cases is only heightened by the lack of direction in the entire Illinois Death Penalty Act. The Act lays no burden of proof or burden of persuasion on the adversaries. The Illinois Death Penalty Act does not create a setting which "require[s] no more line-drawing than is commonly required of a fact-finder in a lawsuit." Proffitt v. Florida, 428 U.S. 242, 258 (1976). Sentencers in Illinois do not evaluate the extreme mental or emotional disturbance in the same way they "have traditionally evaluated the validity of defenses such as insanity," which "involves the same considerations." 428 U.S. at 258. The decision on the latter is made under clear instruction as to the elements to be proved and the burden of persuasion. See, for example, Illinois Pattern Jury Instructions-Criminal, Nos. 24.01 and 2.03. The decision on extreme mental or emotional disturbance is aided by no such guidance as to the quality of the evidence.

This is not to say that "numerical weights" must be attached to the mitigating factors, 428 U.S. at 259; it is only to say that a clear and objective standard must be provided to judge the quality of evidence on a given factor. Whether the mitigating factors outweigh the aggravating factors is another matter.

The vagueness problem in this provision of the Illinois statute is also heightened by the lack of a requirement of specific written findings by the sentencer. The sentencer must decide the question of the existence of an extreme mental or emotional disturbance on its own private interpretation of the term and then may cloak the decision in the secrecy of chambers or the jury room. Written findings were recognized as critical to the process of imposing a death sentence and providing rational review in Gregg v. Georgia, 428 U.S. 153, 211; Proffitt v. Florida, 428 U.S. 242, 250; and Jurek v. Texas, 428 U.S. 262, 269 (1976) and a secret consideration of evidence regarding sentence has been condemned in Gardner v. Florida, 430 U. S. 349, 360 (1977). The potential for arbitrary and capricious consideration of the statutory mitigating factor, extreme mental or emotional disturbance, under the Illinois Death Penalty Act must be condemned.

Therefore, petitioner asks that a writ of certiorari issue to decide the important question of whether the provision of the Illinois Death Penalty Act, "under the influence of an extreme mental or emotional disturbance, although not such as to constitute a defense to prosecution," Ill. Rev. Stat., 1977, Chap. 38, Sec. 9-1(c)(2), is unconstitutionally vague under the Eighth and Fourteenth Amendments.

V.

A.

THE DECISION BELOW, THAT THE STANDARDLESS POST-CONVICTION DISCRETION TO REQUEST OR WAIVE THE DEATH PENALTY VESTED IN PROSECUTORS BY THE ILLINOIS DEATH PENALTY STATUTE DOES NOT VIOLATE THE EIGHTH AMENDMENT, CONFLICTS IN FUNDAMENTAL PRINCIPLE WITH THE DECISION IN FURMAN v. GEORGIA.

The Illinois procedures for the imposition of the death penalty for the offense of murder are contained in Sec. 9-1 of the Illinois Criminal Code. Ill.Rev.Stat., 1977, Ch. 38, Sec. 9-1(a-i). (Appendix D) Section 9-1(a) sets forth the various acts which constitute the offense of murder but does not define those murders for which the death penalty may be imposed. This question is instead answered by reference to Sec. 9-1(b), which lists seven "aggravating factors." The death penalty is a possible sentence only if at least one of these aggravating factors is found to exist by a judge or jury at a separate sentencing hearing held after a defendant has been convicted of murder. Sec. 9-1(g) and (h).

The Illinois statute, however, does not require under any circumstances that a capital sentencing hearing be convened following a defendant's conviction of murder. Rather, under Sec. 9-1(d) of the statute, such a hearing can be held only "[w]here requested by the State," and the statute contains no standards to govern prosecutors in determining whether or not to make such a request. Since a separate sentencing hearing is a mandatory condition precedent to the imposition of the death sentence in any case, it is apparent that under this statutory scheme the applicability of the death penalty in Illinois is not a function of specific legislative definition but rather rests upon whether each individual prosecutor, in his unlimited discretion, decides to request a capital sentencing hearing.

In Furman v. Georgia, 408 U.S. 238 (1972), this Court held that capital punishment laws which afford the sentencing authority unguided discretion to impose or not impose the death penalty violate the Eighth Amendment. The basis of this plurality decision was that as a result of this unlimited

discretion, the death penalty was being imposed in a discriminatory manner, 408 U.S. at 240-257 (Douglas, J., concurring), capriciously and freakishly, 408 U.S. at 309-310 (Stewart, J., concurring), and so infrequently "that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." 408 U.S. at 313 (White, J., concurring).

Subsequently, in Gregg v. Georgia, 428 U.S. 153 (1976), the fundamental principle underlying the judgment in Furman was stated as follows:

> Because of the uniqueness of the death penalty, Furman held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. 428 U.S. at 188 (opinion of Stewart, Powell, and Stevens, J.J.).

Accordingly, with respect to the sentencing authority, this Court in Gregg concluded that Furman requires:

> ...that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action. 428 U.S. at 189.

Considered in light of the above principles, the Illinois death penalty statute does not meet constitutional requirements as it grants prosecutors the absolute discretion to decide whether the death penalty will be a possible sentence in any case in which a defendant is convicted of murder. The effect of this statutory scheme is to expressly vest Illinois prosecutors with the same unfettered and standardless power of selectivity regarding the imposition of the death penalty which Furman held could not be given to a judge or jury.

In rejecting the petitioner's Eighth Amendment claim, the opinion below did not find that the Illinois statute in fact contained guidelines which governed the State's decision to seek or waive the death penalty. Nor could such a finding have been made for the only guidelines in the statute, the aggravating and mitigating factors listed in Sec. 9-1(b) and (c), are not directed at the prosecutor. These guidelines

are expressly made applicable only to the judge or jury and come into play only after the prosecutor has decided to request a capital sentencing hearing. Sec. 9-1(g) and (h).

On the prosecutor's exercise of discretion, the opinion below concluded only that: "[The prosecutor] merely requests a sentencing hearing dependent upon whether the requisite elements for a death sentence exist [and] the prosecutor's discretion is sufficiently guided since he will request a sentencing hearing at the conclusion of the trial, after he will have had the opportunity to evaluate evidence to determine whether a sentencing hearing is, indeed, warranted." People v. Brownell, 79 Ill.2d 508, 404 N.E. 2d 181, 191 (1980) (Appendix A, p. 11) This conclusion does not confront the real Eighth Amendment problem inherent in the Illinois statute. The danger is not that Illinois prosecutors will seek the death penalty in cases where they cannot prove a requisite aggravating factor. The constitutional infirmity in the Illinois statutory scheme lies in the fact that it grants each prosecutor the absolute authority to refuse to request a death penalty hearing in any case, for whatever reason, even though his evidence might unquestionably establish one or more of the aggravating factors. It is this unbridled authority to preclude the possibility that the death penalty will be imposed that violates the basic concerns of Furman. The unguided discretion countenanced by this statute will inevitably lead to an arbitrary and capricious application of the death penalty similar to that condemned in Furman. Some offenders will be chosen for the death penalty by one prosecutor, while others will be spared solely because the lack of statutory direction to the prosecutor will result in uneven application of the law. It is inevitable that the personal beliefs or office policies of the 102 Illinois prosecutors will be the only basis of distinction between some of those on whom the death penalty is imposed and others who are passed over. See People ex rel. Carey v. Cousins, 77 Ill.2d 531, 397 N.E.2d 809 (1979) (Ryan, J., dissenting)

The court below was made aware of the already large number of cases exhibiting the discrepancies among local prosecutorial practice. In one case which had recently been decided by the Court below, the Illinois Attorney General imposed his prosecutorial discretion upon the local prosecutor's decision by confessing that the decision had been in error. People v. Greer, 79 Ill.2d 103, 402 N.E.2d 203, (1980). Petitioner specifically noted two cases (Appendix E, List A) in which the prosecutor initially requested the special sentencing hearing for imposition of the death sentence hearing and after the hearing had been completed and the jury had begun its deliberation, rescinded his request and permitted imposition of a term of years of imprisonment upon the offender. Petitioner also provided to the court below his list of sixteen other cases (Appendix E, List B) of which he was aware in which, despite the existence of a death penalty aggravating factor, the prosecutor did not request a special sentencing hearing to seek the death sentence. In this case itself, the prosecutor had decided prior to trial that he would not seek the death penalty against petitioner, and then in his absolute discretion changed his mind after trial and convened a death sentencing hearing.

These cases expose the risk of arbitrariness and caprice expressely injected into the Illinois death penalty scheme by Sec. 9-1(d) of the Death Penalty Act. The unlimited, post-conviction discretion bestowed upon prosecutors directly violates the command of this Court in Furman. For this reason, certiorari should be granted to review the judgment of the Supreme Court of Illinois.

THE CONSTITUTIONALITY OF THE UNIQUE POST-CONVICTION DISCRETION VESTED IN PROSECUTORS BY THE ILLINOIS DEATH PENALTY STATUTE HAS NOT BEEN DETERMINED BY THIS COURT IN ANY OF THE DEATH PENALTY CASES DECIDED SINCE FURMAN V. GEORGIA.

Under the statutes of Georgia, Flordia, and Texas which were upheld by this Court in Gregg and its companion cases, Proffitt v. Florida, 428 U.S. 242 (1976) and Jurek v. Texas, 428 U.S. 262 (1976), the only discretion granted the prosecutor involved the pre-trial decision to charge or not charge a capital offense. Under these statutes, once a defendant has been charged with an offense punishable by death the prosecutor has no discretion or power to preclude the possibility of the death penalty being imposed, for upon conviction of such an offense a death penalty hearing is mandatory. Ga Code Ann., 1975, Supp., Sec. 27-2534.1(b); Fla Stat. Ann., 1976-77 Supp., Sec. 921.141(1); Tex. Code Crim. Proc., 1975-76 Supp., Art. 37.071(a).[1] Thus, in rejecting a challenge to the prosecutor's discretion in these cases, this Court held only that the existence of the prosecutor's traditional charging power was not impermissible under Furman. None of the statutes upheld by this Court vests the prosecutor with the unique post-conviction discretion to request or to waive a death penalty hearing as does the Illinois statute.

The difference between the two types of discretion is fundamental with respect to Eighth Amendment concerns. For example, although the decision of the Georgia prosecutor whether to charge a capital offense is a matter of discretion, this discretion is neither unlimited nor unguided. Standards

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[1] The same limitation of prosecutorial discretion to pre-trial charging decisions was contained in the statutes of North Carolina, Louisiana, and Ohio, the only other state death penalty laws which this Court has reviewed. See, Woodson v. North Carolina, 428 U.S. 280, 286 (1976); Roberts v. Louisiana, 428 U.S. 325, 329-330 (1976); Lockett v. Ohio, 438 U.S. 586, 609-610 (1978).

for the prosecutor's charging decision are contained in the substantive law defining the elements of a capital offense. Thus, in determining whether to charge a capital offense the prosecutor is always guided by the criterion of whether his evidence establishes all of the statutory elements of that offense. It is true that a prosecutor in Georgia could refuse to charge a capital offense even though his evidence would support such a charge and could thereby preclude the possibility of the death penalty. However, the prosecutor could do so only by disregarding the legislative will which is embodied in the statutory definition of the capital offense. It can reasonably be assumed, as three members of this Court in Gregg assumed, that very few prosecutors would arbitrarily ignore the statutory guidelines by making their charging decisions on any basis other than the sufficiency of the evidence to prove a capital offense. Gregg v. Georgia, 428 U.S. at 224-225 (White, J., Burger, C.J., and Rehnquist, J., concurring); see also, Roberts v. Louisiana, 428 U.S. 325, 348-349 (White, J., Burger, C.J., Blackmun, J., and Rehnquist, J., dissenting). For these reasons, it can properly be concluded that the presence of the customary prosecutorial charging discretion in the Georgia, Florida, and Texas systems does not create a substantial risk that the death penalty will be imposed in an arbitrary or freakish manner.

In contrast to the above situation, the discretion afforded prosecutors under the Illinois statutory scheme is of a totally different and unlimited nature. Under the Illinois statute, a prosecutor's ability to preclude the imposition of the death penalty in any case is not left to his traditional charging power; rather, this statute directly grants Illinois prosecutors the unfettered authority to decide whether any offender will be subject to the possibility of a death sentence only after he has been convicted of murder. Specifically, the Illinois death penalty statute contains no standards whatever which govern the prosecutor's

exercise of this authority. The statute does not mandate that a prosecutor request the death penalty even if his evidence establishes one or more of the aggravating factors. Therefore, unlike the situation in Georgia, Florida, and Texas, an Illinois prosecutor can refuse to seek the death penalty in any case, for whatever reason he personally deems proper, and by doing so he would violate neither his official trust nor any statutory policy. To paraphrase a condemning observation from Furman, under the Illinois statutory scheme,

> ...the legislature does not itself mandate the [death] penalty in any particular class or kind of case (that is, legislative will is not frustrated if the penalty is never imposed), but delegates [to prosecutors] the decisions as to those cases, if any, in which the penalty will be utilized... Furman v. Georgia, 408 U.S. 238, 311 (White, J., concurring).

In summary, the only form of prosecutorial discretion that has been upheld by this Court in the death penalty context is the traditional charging power. Such discretion is unavoidable in our criminal justice systems and has been characterized as being "no more than normal." Roberts v. Louisiana, 428 U.S. 325, 348-349 (White, J., Burger, C.J., Blackmun, J., and Rehnquist, J., dissenting). In contrast, the post-conviction discretion vested in prosecutors by the Illinois statute is both unusual and totally avoidable. Indeed, the Illinois General Assembly could have avoided the Eighth Amendment defect by simply requiring that a death penalty hearing be held whenever a defendant is convicted of capital murder as did the legislatures in Georgia, Florida, and Texas. It would then be up to the judge or jury, not the prosecutor, to decide under the guidance of the statutory aggravating and mitigating factors whether the evidence in each capital case warranted the death penalty. Instead, by explicitly injecting unbridled prosecutorial discretion into the capital sentencing process, the Illinois General Assembly drafted a statute, upheld in this case, 404 N.E.2d at 191 (Appendix A, p. 11), which needlessly creates the very real danger that the death penalty in Illinois will be

imposed in an arbitrary and freakish manner.

In Gregg v. Georgia, it was stated that in determining whether a death penalty law satisfies the concerns of Furman, "...each distinct system must be examined on an individual basis." 428 U.S. at 195 (opinion of Stewart, Powell, and Stevens, J.J.). The validity under the Eighth Amendment of the unique post-conviction discretion granted prosecutors by the Illinois statutory scheme has never been considered by this Court, and certiorari should be granted to decide this important question.

CONCLUSION

For the reasons stated, petitioner requests that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Illinois as to each of the questions presented.

Respectfully submitted,

Mark Schuster

Mary Robinson, Deputy Defender
Mark Schuster, Assistant Defender
Office of the State Appellate Defender
63 Douglas Avenue
Suite 300
Elgin, Illinois 60120
(312)-695-8822

COUNSEL FOR PETITIONER

APPENDIX A

OPINION

SUPREME COURT OF ILLINOIS

United States of America

State of Illinois } ss.
Supreme Court }

At a Term of the Supreme Court, *begun and held in Springfield, on Monday, the* tenth *day of* March *in the year of our Lord, one thousand nine hundred and* eighty *, within and for the State of Illinois.*

PRESENT: JOSEPH H. GOLDENHERSH, CHIEF JUSTICE

JUSTICE ROBERT C. UNDERWOOD — JUSTICE DANIEL P. WARD

JUSTICE HOWARD C. RYAN — JUSTICE WILLIAM G. CLARK

JUSTICE THOMAS J. MORAN — JUSTICE THOMAS E. KLUCZYNSKI

WILLIAM J. SCOTT, ATTORNEY GENERAL

LOUIE F. DEAN, MARSHAL

ATTEST: CLELL L. WOODS, CLERK

Be It Remembered, *that afterwards, to-wit, on the* 21st *day of* March *,19* 80.

the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:

People State of Illinois,

Appellee

No. 51646 vs.

Curtis Brownell,

Appellant

Appeal from Circuit Court Boone County

RECEIVED
MAR 24 1980
OFFICE OF THE STATE APPELLATE DEFENDER
ELGIN, ILLINOIS

CLELL L. WOODS
CLERK OF THE SUPREME COURT
STATE OF ILLINOIS

Docket No. 51646—Agenda 5—November 1979.
THE PEOPLE OF THE STATE OF ILLINOIS, Appellee,
v. CURTIS J. BROWNELL, Appellant.

MR. JUSTICE CLARK delivered the opinion of the court:

In a five-count indictment the defendant, Curtis J. Brownell, was charged with the murder, aggravated kidnapping and rape of Louise M. Betts. Count I charged that the defendant "committed the offense of murder, in that he, without lawful justification and with the intent to kill Louise M. Betts, strangled" her and thereby caused her death. (Ill. Rev. Stat. 1977, ch. 38, par. 9—1(a)(1).) Count II charged that the defendant committed murder by strangling Louise M. Betts, knowing that "such act created a strong probability of death or great bodily harm." (Ill. Rev. Stat. 1977, ch. 38, par. 9—1(a)(2).) Count III charged the defendant with felony murder in that he killed the decedent while attempting or committing the forcible felonies of aggravated kidnapping and rape (Ill. Rev. Stat. 1977, ch. 38, par. 9—1(a)(3)). Count IV charged the defendant with committing the offense "of Aggravated Kidnaping, in that he, in committing the offense of kidnaping, in violation of Illinois Revised Statutes, chapter thirty-eight, section 10—1(a)(2), knowingly and secretly confined Louise M. Betts against her will and inflicted another felony, to wit: Rape, upon her." Count V charged that the defendant "committed the offense of Rape, in that he, a male person of the age of 14 years and upwards, had sexual intercourse with Louise M. Betts, a female not his wife, by force and against her will." Ill. Rev. Stat. 1977, ch. 38, par. 11—1(a).

On September 13, 1978, after a bench trial, the defendant was found guilty of counts I, III, IV, and V by the circuit court of Boone County. Count II was dismissed on the motion of the State. The judgment of conviction under count III was subsequently vacated. A final judgment of conviction was entered as to counts I, IV and V.

The State requested a sentencing hearing for the purpose of imposing the death penalty pursuant to section 9—1(d) of the Criminal Code of 1961 (Ill. Rev. Stat. 1977, ch. 38, par. 9—1(d)). The defendant waived a jury proceeding and elected to be sentenced by the court. The court sentenced the defendant to two concurrent terms of 30 to 90 years in the penitentiary for the offenses of aggravated kidnapping and rape. The court found that based on the evidence adduced at trial two aggravating factors had been established—that the murdered individual was killed in the course of two other felonies, aggravated kidnapping and rape (Ill. Rev. Stat. 1977, ch. 38, par.

9—1(b)(6)), and that the murdered individual was an eyewitness against the defendant (Ill. Rev. Stat. 1977, ch. 38, par. 9—1(b)(7)). After hearing evidence in aggravation and mitigation, the court found that the State had proved the two aggravating factors beyond a reasonable doubt but that the defendant had not established any mitigating factors sufficient to preclude the imposition of the death sentence. The court then sentenced the defendant to death for the offense of murder. The court set November 5, 1979, as the date for the execution of the sentence of death. The sentence was stayed (73 Ill. 2d R. 609(a)) pending direct appeal to this court pursuant to Rule 603 (73 Ill. 2d R. 603; Ill. Rev. Stat. 1977, ch. 38, par. 9—1(i)).

Through a written statement made by the defendant and admitted at trial, it was revealed that on September 27, 1977, the defendant picked up the victim, Louise M. Betts, while she was hitchhiking on a road in Boone County. The defendant held a jack knife to the victim's throat and drove to a road with cornfields on either side. The defendant stopped the car and told the victim to get out and take off her clothes. He then engaged in sexual intercourse with her. The defendant thereafter attempted to strangle the victim, but she was able to get up and run an undetermined distance. The defendant caught her, strangled her again, and then stood or jumped on her stomach and neck. The defendant dragged the victim farther into the cornfield and left her. He said he felt her pulse before he left her but he did not know whether she was dead or not.

The defendant was arrested on another charge on February 2, 1978, by Winnebago County police. On March 31, 1978, Boone County detectives requested an interview with the defendant while he was still in custody in Winnebago County on charges, unrelated to the instant case, of attempted murder and rape. The defendant was interviewed on March 31, 1978, and again on April 1, 1978. Defendant requested counsel after the first interview on March 31, 1978, and was afforded the opportunity to consult with counsel several times beginning at 6:15 p.m. on March 31, 1978. On April 2, 1978, at approximately 2 a.m. the defendant requested to see the detectives. One of the detectives advised the defendant that he had the right to have counsel present and offered to call counsel. The defendant refused the offer, stating that his lawyer would not let him say everything he wished to say.

The defendant signed a rights waiver form and then gave a three-page statement inculpating himself with regard to the aggravated kidnapping, rape and murder of Louise M. Betts.

The defense made a motion to suppress the statement on the basis, *inter alia*, that he had been denied his right to counsel and his right to remain silent. The motion to suppress was denied. The defense also made motions to bar the imposition of the death sentence, to acquire funds for expert witnesses, to exclude questions on *voir dire* regarding the veniremen's convictions concerning the death penalty, and to hold the death penalty act unconstitutional. These and several other motions were denied, and are properly preserved for review.

The defendant attacks the written statement on two grounds: first, that its admission against him violated his right against self-incrimination under the fifth and fourteenth amendments to the United States Constitution and under article I, section 10, of the Illinois Constitution of 1970. The defendant argues that the written statement was taken from him in disregard of his right to counsel guaranteed by the sixth and fourteenth amendments to the United States Constitution and article I, section 8, of the Illinois Constitution.

The State rejoins that the defendant made a knowing, intelligent and voluntary waiver of his right to remain silent and his right to counsel.

The State has a heavy burden to show that a defendant has waived his constitutional rights in a knowing, intelligent and voluntary manner. (*Miranda v. Arizona* (1966), 384 U.S. 436, 475, 16 L. Ed. 2d 694, 724, 86 S. Ct. 1602, 1628.) We think that burden has been sufficiently borne here. A detailed review of testimony at trial concerning events leading up to the statement shows that the defendant was in the custody of the Winnebago County police on charges of attempted murder and rape on March 31, 1978. At approximately 2:15 p.m. on that day, Winnebago County detective Robert Ferger, accompanied by Boone County detective Joe Rollins, interviewed the defendant. The defendant interrupted Rollins during the reading of the *Miranda* rights to ask for his attorney to be present. Rollins did not call the defendant's attorney; instead he ceased questioning the defendant. Before he walked out of the interview room, Rollins placed a picture of Louise Betts, the murder victim, in front of the defendant and asked the defendant if he recognized the person in the picture. According to the testimony of the two detectives received during the hearing on a second motion to suppress, the defendant "jerked back slightly" and responded he did not know the person. The motion to suppress was granted so that the incident with the photograph and testimony of the two officers concerning it were kept from the jury during the trial.

By 6:15 p.m. on March 31, 1978, the defendant was represented by counsel. At that time the defendant appeared in a lineup, concerning the Winnebago County offense. The defendant met with counsel before and after the lineup. After the lineup, Gary Arbisi, a Winnebago County detective investigating the previously referred to offenses informed the defendant that he could speak to the police whether his attorney was present or not. The defendant stated he would follow counsel's advice. Arbisi started to say something else but counsel prevented him from doing so.

The next day, April 1, 1978, at approximately 6 p.m., Arbisi and another detective went to the defendant's home to speak with the defendant's wife concerning information they had received that the defendant had told Mrs. Brownell he was guilty of murder. Mrs. Brownell asked to speak with her lawyer. When counsel arrived he advised Mrs. Brownell not to speak to the detectives. Mrs. Brownell eventually agreed to talk to the detectives, but only if she could first speak with the defendant. The detectives then arranged a visit at the jail between the defendant and his wife. The defendant met separately with counsel, then with his wife and, later, again with counsel. Mrs. Brownell agreed to tell the police "everything" but, after a phone call with the defendant's stepfather, an attorney, she declined to make a statement.

The defendant's counsel, after his later meeting with the defendant, stated to a detective that he thought negotiations should begin with the State's Attorney to waive the death penalty in any ensuing proceeding. Counsel then met with the State's Attorneys of Boone and Winnebago counties and two assistant State's Attorneys until 10 p.m. An offer was made by the State's Attorneys that if the defendant made a written confession of murder, the death penalty would not be sought at trial. Thereafter the defendant, after conferring again with counsel, declined the offer.

A final conference took place among the defendant, defense counsel, and Detectives Arbisi and Rollins. Arbisi asked the defendant if he wished to speak to the detectives. Counsel advised the defendant not to do so. Arbisi then asked counsel for permission to speak to the defendant. Counsel granted permission. Arbisi told the defendant that while the defendant did not have to speak to the police, if he changed his mind and wanted to speak to the police, with or without counsel present, the defendant could do so. The defendant said he would follow counsel's advice. A few minutes later, on the way to his cell, the defendant was asked again by Arbisi whether he wished to talk. The defendant answered that he needed more time.

Counsel informed the other attorneys that the defendant needed more time to consider their offer. It was approximately 1 a.m. on April 2, 1978, when all parties dispersed.

Approximately one hour later, the defendant told the jailer he wanted to talk to the police. Detectives Arbisi and Packard were summoned. When they met the defendant in an interview room, Arbisi asked the defendant whether the defendant desired to have counsel present. The defendant said he did not want counsel to be present. The defendant was advised of his *Miranda* rights. The defendant said he understood his rights and signed a statement to that effect. He then gave an incriminating written statement to the police.

The defendant argues that he did not waive either the right to remain silent or the right to counsel. He states that the right to remain silent was violated when the detectives did not "scrupulously honor" it at the initial interrogation session. Also, the defendant states that any subsequent statement by him was rendered inadmissible by the initial violation of his right to remain silent.

We agree that the detectives did not "scrupulously honor" the defendant's right to cut off questioning in the first instance. (*Michigan v. Mosley* (1971), 423 U.S. 96, 104, 46 L. Ed. 2d 313, 321, 96 S. Ct. 321, 326.) The complete statement by the court in *Mosley* is "that the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.'" (423 U.S. 96, 104, 46 L. Ed. 2d 313, 321, 96 S. Ct. 321, 326.) We interpret that passage, however, to include only the statement obtained as a result of not honoring the defendant's right to cut off questioning. We do not think the court intended that *all* subsequent statements are to be excluded. Indeed, our view is amply supported by the following passage from *Michigan v. Mosley:*

> "To permit the continuation of custodial interrogation after a momentary cessation would clearly frustrate the purposes of *Miranda* by allowing repeated rounds of questioning to undermine the will of the person being questioned. At the other extreme, a blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances, would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests. Clearly, therefore, neither this passage nor any other passage

in the *Miranda* opinion can sensibly be read to create a *per se* proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent." (423 U.S. 96, 102-03, 46 L. Ed. 2d 313, 320-21, 96 S. Ct. 321, 326.)

Accord, (*People v. Aldridge* (Jan. 23, 1980), No. 51824.) Therefore, in the instant case, the trial court was correct in excluding evidence concerning the initial interrogation on March 31, 1978, on the basis that the defendant's right to cut off questioning had not been scrupulously honored. The trial court was also correct in finding that the admission of the written statement did not violate the defendant's right to remain silent. The written statement was made 36 hours after the initial interrogation, after the defendant had conferred with counsel several times, after the defendant had been informed of his *Miranda* rights, and after the defendant had expressly declined to remain silent or to have counsel present. The defendant's right to remain silent was not violated.

We also think that the defendant's right to counsel was properly observed. Before taking the written statement from the defendant, the detective offered three times to call his attorney. The defendant declined each offer. He expressly said the attorney would not permit him to say what he wished to say to the detectives.

Finally, we do not think that the defendant's waiver of the right to remain silent and the right to counsel was defective due to the "affirmative, repeated efforts" of the detectives to obtain a confession. The detectives did not coerce or threaten the defendant into speaking with them. Moreover, most of the attempts they made to persuade the defendant to confess were made in the presence of counsel. Lastly, it was one hour after the defendant was placed in a cell and after his last contact with the detectives that he decided to confess.

The finding of the trial court on the voluntariness of a confession will not be disturbed unless it can be said that it is contrary to the manifest weight of the evidence. (*People v. Aldridge* (Jan. 23, 1980), No. 51824; *People v. Medina* (1978), 71 Ill. 2d 254, 258.) We think the weight of the evidence herein is that the defendant's waiver of the right to remain silent and the right to counsel was voluntary, knowing and intelligent. The trial court properly admitted the written statement.

The defendant next argues that the trial court erred in denying his motion to preclude questions during *voir dire* concerning the death penalty. The defendant asserts

specifically that "death qualification" *voir dire* questions result in a jury biased in favor of the prosecution in violation of the defendant's right to an impartial trial. After the trial court denied his motion, the defendant waived his right to a jury trial. The defendant now argues that the court "improperly influenced" him to waive his right to a jury trial by denying the motion to preclude "death qualification" questions. The State argues in reply that the defendant, by waiving his right to a jury trial, has not preserved an issue for review.

We think that the defendant has preserved for review the question of whether the trial court properly denied the motion to preclude "death qualification" questions on *voir dire*. The defendant made the motion; it was denied; and he is raising the propriety of the court's denial on appeal. (See, *e.g.*, *People v. Duchant* (1939), 370 Ill. 650, 652.) Where we agree with the State is that, in subsequently waiving the right to a jury trial, the defendant eliminated the need to conduct *voir dire*. The defendant cannot then assert that had *voir dire* been conducted, the court would have erroneously selected a jury, in contravention of *Witherspoon v. Illinois* (1968), 391 U.S. 510, 20 L. Ed. 2d 776, 88 S. Ct. 1770. The defendant offers no factual basis whatsoever for this contention, and we reject any presumption that the court would err.

The defendant's concomitant contention is that the court "improperly influenced" him to waive a jury trial when it denied the motion. No act of the court prevented the defendant from having a jury trial. If error had occurred in *voir dire*, the defendant could have objected at that point and counsel could have drawn the court's attention to the error. If the error was not corrected, the defendant could raise the issue here. The defendant did none of this. Instead he argues that he was deprived of a jury trial because of error which *might* have occurred, but did not. We will not indulge in speculation as to what error the court might have committed, and we refuse to assume that the spectre of speculative error influenced the defendant to waive his right to trial by jury.

The defendant next contends that since his indictment did not specify any one of the seven aggravating factors which must be proved to impose the death penalty (Ill. Rev. Stat. 1977, ch. 38, par. 9–1(b)), he was formally charged with "non-capital" murder and may not be sentenced to death. The defendant asserts that the imposition of the death penalty under these circumstances violates Illinois case law and principles of double jeopardy.

The case the defendant principally relies upon is *People v. Ostrand* (1966), 35 Ill. 2d 520. The defendant's reliance on *Ostrand* is misplaced. *Ostrand* involved a conviction for unlawful use of weapons. The defendant argued there that the trial court erred when it permitted the indictment to stand because it alleged that he had committed a prior felony within five years of the date of the immediate offense. The unlawful use of weapons statute (Ill. Rev. Stat. 1977, ch. 38, par. 24–1(b)) provides that a person will be chargeable with a felony instead of a misdemeanor when a prior felony has been committed within five years of the immediate offense. Thus, this court held that it was not only proper, but also necessary, for the trial court to permit the allegation and, later, the proof of the prior felony conviction to be admitted. *People v. Ostrand* (1966), 35 Ill. 2d 520, See also *People v. Owens* (1967), 37 Ill. 2d 131; *People v. Dixon* (1970), 46 Ill. 2d 502, 504; *People v. Edwards* (1976), 63 Ill. 2d 134, 138.

The defendant bases the contention that the imposition of the death sentence violates double jeopardy principles upon the argument that the defendant has been tried twice, first in a trial for the lesser included offense of murder and then in the sentencing hearing for the offense of "capital murder." The solution, posits the defendant, lies in formally charging the defendant with all of the elements of the offense to be proved against him, particularly the statutory aggravating factor necessary to the imposition of the death sentence. Thus, argues the defendant, since he was tried a second time, without a formal charge for "capital" murder, the proceeding was violative of principles of Illinois law and the double jeopardy provisions of the fifth and fourteenth amendments to the United States Constitution.

First of all, there is only one offense of murder in Illinois; no distinction is made between capital and non-capital murder. (See Ill. Rev. Stat. 1977, ch. 38, par. 9–1.) Secondly, without holding that every indictment must contain every aggravating factor which the State will attempt to prove, we hold that, in the indictment involved here, one of the aggravating factors found by the court at the sentencing hearing was sufficiently alleged in the indictment to fulfill the requirements of law. An indictment's allegations must be set out with such specificity or particularity that the accused is informed of the offense with which he is charged and enabled to prepare his defense and, further, that he is protected against being later prosecuted for the same crime. (*People v. Gregory* (1974), 59 Ill. 2d 111, 114.) The indictment satisfied the foregoing requirements. The defendant was charged with

the murder, aggravated kidnapping and rape of Louise M. Betts on September 27, 1977. One of the aggravating factors relied upon by the court in sentencing the defendant was that the defendant intentionally murdered the victim in the course of two other felonies, aggravated kidnapping and rape. Section 9–1(b)(6) provides:

> "(b) Aggravating Factors. A defendant who at the time of the commission of the offense has attained the age of 18 or more and who has been found guilty of murder may be sentenced to death if:
>
> * * *
>
> 6. the murdered individual was killed in the course of another felony if:
>
> (a) the murdered individual was actually killed by the defendant and not by another party to the crime or simply as a consequence of the crime; and
>
> (b) the defendant killed the murdered individual intentionally or with the knowledge that the acts which caused the death created a strong probability of death or great bodily harm to the murdered individual or another; and
>
> (c) the other felony was one of the following: armed robbery, robbery, rape, deviate sexual assault, aggravated kidnapping, forcible detention, arson, burglary, or the taking of indecent liberties with a child." (Ill. Rev. Stat. 1977, ch. 38, par. 9–1(b)(6).)

Thus, we think the indictment's allegations specifically and particularly informed the defendant of the charges against him so that he could prepare his defense and so that he was fully apprised, from indictment on, that he could potentially receive the death sentence. Since we hold the indictment sufficiently informed the defendant of the offenses against him and, in particular, that he might receive the death sentence, the defendant's contention that principles of double jeopardy were violated loses its force. The defendant was charged with the single offense of murder, and has been convicted and sentenced only once, as is wholly consistent with the guarantee afforded by the double jeopardy provisions of the fifth and fourteenth amendments to the Constitution, which assure " 'that no man can be twice lawfully punished for the same offence.' " *North Carolina v. Pearce* (1969), 395 711, 717, 23 L. Ed. 2d 656, 665, 89 S. Ct. 2072, 2076, quoting *Ex parte Lange* (1874), 85 U.S. (18 Wall.) 163, 168, 21 L. Ed. 872, 876. There was no double jeopardy here.

Finally, we emphasize that we are limiting our conclusion to one aggravating factor—that the murder was committed in the course of other felonies, *i.e.*, rape and aggravated kidnapping. While the issue was not raised by the defendant, we conclude that the second aggravating factor found by the trial court—that the murdered individual was an eyewitness or possessed other material

evidence against the defendant (Ill. Rev. Stat. 1977, ch. 38, par. 9–1(b)(7)),–was not established in this case. The court appears to have made the finding that the victim was an eyewitness upon the evidence adduced at trial–that the victim, as the subject of the aggravated kidnapping and rape, could have later testified against the defendant. We do not think this particular factual situation was intended by the General Assembly to be included within this aggravating factor. Rather, we think the General Assembly intended to include situations where, during an investigation or prosecution of a separate offense which has previously taken place, a witness is killed in an attempt to stymie the investigation or prosecution. (See Remarks of Senator Knuppel, Ill. S. Rec., 80th Gen. Assem., June 1, 1977, at 21-25.) Otherwise, were we to adopt the trial court's finding, this aggravating factor could apply in every prosecution for murder where another offense contemporaneously occurs because the victim could have been a witness against the defendant. Or, even more broadly, this aggravating factor could apply to every prosecution for murder since every victim, obviously, is prevented from testifying against the defendant. We do not think the General Assembly intended the death penalty to be applied in every murder case, and, if it did, the General Assembly could certainly find a more direct way to express its intent than through this aggravating factor. Therefore we hold that the aggravating factor relating to a murdered individual who was, or who may be, a witness against a defendant, or who may assist in the investigation or prosecution of a defendant, does not include the investigation or prosecution for the offenses which occurred in the course of the commission of the murder offense, including the murder offense itself.

The defendant's next two assignments of error challenge the constitutionality, under the cruel and unusual punishment clause of the eighth amendment and the due process clause of the fourteenth amendment, of the prosecutor's ability to request a sentencing hearing. The defendant also again argues that the indictment is defective because the death sentence hearing is begun by the prosecutor without there being any formal charge of "aggravated murder," thus offending the eighth amendment.

First, as to the indictment, that issue was already decided herein. There is no offense of "aggravated," as opposed to simple, murder, in Illinois. There is simply one murder statute, which includes within it a provision for the imposition of the death sentence. Moreover, as we have already concluded, the defendant was adequately informed that, on the basis of the charges against him, he could possibly receive the death sentence since he was charged

with murder while in the commission of two other felonies: aggravated kidnapping and rape. Therefore, the defendant's argument that the cruel and unusual punishment clause is violated because of the insufficiency of the indictment lacks merit.

As to the defendant's other arguments that the prosecutor's discretion to request a sentencing hearing will lead to cruel and unusual punishment and the arbitrary and capricious imposition of the death penalty in violation of the eighth amendment, we believe those issues were addressed and resolved in our recent decision in *People ex rel. Carey v. Cousins* (1979), 77 Ill. 2d 531. There we held that the discretion vested in the prosecutor pursuant to section 9—1(d) of the murder statute (Ill. Rev. Stat. 1977, ch. 38, par. 9—1(d)) does not offend the eighth amendment because the prosecutor does not act as the sentencing authority. He merely requests a sentencing hearing dependent upon whether the requisite elements for a death sentence exist. Also, we held that the prosecutor's discretion is sufficiently guided since he will request a sentencing hearing at the conclusion of the trial, after he will have had the opportunity to evaluate evidence to determine whether a sentencing hearing is, indeed, warranted.

The next contention of the defendant—that section 9—1(d) constitutes an improper delegation of legislative authority and an improper grant of judicial sentencing power to the executive branch—was also decided and rejected in *People ex rel. Carey v. Cousins* (1979), 77 Ill. 2d 531. We need not consider it again here.

The next argument raised by the defendant is that the death penalty provisions of section 9—1 offend the due process clause of the fourteenth amendment because they permit the arbitrary imposition of the death sentence, based upon vague sentencing standards. The argument continues that the statute does not contain guidelines or standards as to the weight to be given the aggravating and mitigating factors. The pertinent provisions of section 9—1 state:

> "(b) Aggravating Factors. A defendant who at the time of the commission of the offense has attained the age of 18 or more and who has been found guilty of murder may be sentenced to death if:
>
> 1. the murdered individual was a peace officer or fireman killed in the course of performing his official duties and the defendant knew or should have known that the murdered individual was a peace officer or fireman; or
>
> 2. the murdered individual was an employee of an institution or facility of the Department of Corrections, or any similar local correctional agency, killed in the course of performing his official duties, or the murdered individual was an inmate at such institution or facility and

was killed on the grounds thereof, or the murdered individual was otherwise present in such institution or facility with the knowledge and approval of the chief administrative officer thereof; or

3. the defendant has been convicted of murdering two or more individuals under subsection (a) of this Section or under any law of the United States or of any state which is substantially similar to Subsection (a) of this Section regardless of whether the deaths occurred as the result of the same act or of several related or unrelated acts so long as the deaths were the result of either an intent to kill more than one person or of separate premeditated acts; or

4. the murdered individual was killed as a result of the hijacking of an airplane, train, ship, bus or other public conveyance; or

5. the defendant committed the murder pursuant to a contract, agreement or understanding by which he was to receive money or anything of value in return for committing the murder or procured another to commit the murder for money or anything of value; or

6. the murdered individual was killed in the course of another felony if:

(a) the murdered individual was actually killed by the defendant and not by another party to the crime or simply as a consequence of the crime; and

(b) the defendant killed the murdered individual intentionally or with the knowledge that the acts which caused the death created a strong probability of death or great bodily harm to the murdered individual or another; and

(c) the other felony was one of the following: armed robbery, robbery, rape, deviate sexual assault, aggravated kidnapping, forcible detention, arson, burglary, or the taking of indecent liberties with a child; or

7. the murdered individual was a witness in a prosecution against the defendant, gave material assistance to the state in any investigation or prosecution of the defendant, or was an eye witness or possessed other material evidence against the defendant.

(c) Consideration of factors in Aggravation and Mitigation. The court shall consider, or shall instruct the jury to consider any aggravating and any mitigating factors which are relevant to the imposition of the death penalty. Aggravating factors may include but need not be limited to those factors set forth in subsection (b). Mitigating factors may include but need not be limited to the following:

1. the defendant has no significant history of prior criminal activity;

2. the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, although not such as to constitute a defense to prosecution;

3. the murdered individual was a participant in the defendant's homicidal conduct or consented to the homicidal act;

4. the defendant acted under the compulsion of threat or menace of the imminent infliction of death or great bodily harm;

5. the defendant was not personally present during commission of the act or acts causing death.

***

(c) Evidence and Argument.

During the proceeding any information relevant to any of the factors set forth in Subsection (b) [aggravating factors] may be presented by either the State or the defendant under the rules governing the admission of evidence at criminal trials. Any information relevant to any additional aggravating factors or any mitigating factors indicated in Subsection (c) may be presented by the State or defendant regardless of its admissibility under the rules governing the admission of evidence at criminal trials. The State and the defendant shall be given fair opportunity to rebut any information received at the hearing.

(f) Proof.

The burden of proof of establishing the existence of any of the factors set forth in Subsection (b) [aggravating factors] is on the State and shall not be satisfied unless established beyond a reasonable doubt.

(g) Procedure—Jury. I

If at the separate sentencing proceeding the jury finds that none of the factors set forth in Subsection (b) exists, the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections. If there is a unanimous finding by the jury that one or more of the factors set forth in Subsection (b) exist, the jury shall consider aggravating and mitigating factors as instructed by the court and shall determine whether the sentence of death shall be imposed. If the jury determines unanimously that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the court shall sentence the defendant to death.

Unless the jury unanimously finds that there are no mitigating factors sufficient to preclude the imposition of the death sentence the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections.

(h) Procedure—No Jury.

In a proceeding before the court alone, if the court finds that none of the factors found in Subsection (b) exists, the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections.

If the Court determines that one or more of the factors set forth in Subsection (b) exists, the Court shall consider any aggravating and mitigating factors as indicated in Subsection (c). If the Court determines that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the Court shall sentence the defendant to death.

Unless the court finds that there are no mitigating factors sufficient to preclude the imposition of the sentence of death, the court shall sentence the defendant to a term

of imprisonment under Chapter V of the Unified Code of Corrections." Ill. Rev. Stat. 1977, ch. 38, pars. 9–1(b), (c), (e), (f), (g), (h).

The focus of the defendant's argument is on the word "sufficient" in the statement that if the jury (or the court), determines that there are no mitigating factors *sufficient* to preclude the imposition of the death sentence, the court shall sentence the defendant to death. The defendant asserts that the trier of fact is not guided as to the weight to be given the aggravating versus the mitigating factors. Thus, argues the defendant, the statute is unconstitutionally vague.

We do not agree, and we think that this issue is controlled by the decisions in *Gregg v. Georgia* (1976), 428 U.S. 153, 49 L. Ed. 2d 859, 96 S. Ct. 2909, *Proffitt v. Florida* (1976), 428 U.S. 242, 49 L. Ed. 2d 913, 96 S. Ct. 2960, and *Jurek v. Texas* (1976), 428 U.S. 262, 49 L. Ed. 2d 929, 96 S. Ct. 2950. In *Gregg*, in an exhaustive opinion, the Supreme Court detailed the constitutionality of the death penalty, in general, and of the Georgia death penalty statute (Georgia Code Ann. sec. 26–1101 (1972) (murder)), in particular. The court held that the punishment of death does not invariably violate the Constitution (428 U.S. 153, 169, 49 L. Ed. 2d 859, 872, 96 S. Ct. 2909, 2923). Also, the court held that the provision of the Georgia act whereby the trier of fact "considers" the aggravating and mitigating circumstances at a separate sentencing proceeding does not result in the capricious or freakish imposition of the death sentence. 428 U.S. 153, 169, 49 L. Ed. 2d 859, 872, 96 S. Ct. 2909, 2923.

The court stated that "*Furman* [*v. Georgia* (1972), 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726,] mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." (*Gregg v. Georgia* (1976), 428 U.S. 153, 189, 49 L. Ed. 2d 859, 883, 96 S. Ct. 2909, 2932.) The court went on to conclude that while the process whereby the sentencing authority weighed the aggravating circumstances, proved beyond a reasonable doubt, against the mitigating circumstances, is by necessity somewhat general, it provides guidance to the sentencing authority and reduces the likelihood that the death sentence will be imposed capriciously or arbitrarily. (*Gregg v. Georgia* (1972), 428 U.S. 153, 193-95, 49 L. Ed. 2d 859, 886, 96 S. Ct. 2909,

2935.) The court further said that the safeguard of meaningful appellate review, taken together with the requirement that the sentencing authority specify the factors it relied upon to reach its decision, would further insure that death sentences are not imposed capriciously or in a freakish manner. 428 U.S. 153, 195, 49 L. Ed. 2d 859, 886-87, 96 S. Ct. 2909, 2935.

Proffitt v. Florida (1976), 428 U.S. 242, 49 L. Ed. 2d 913, 96 S. Ct. 2960, may be even more pertinent since there, as here, the court imposed the death sentence; in *Gregg* the jury sentenced the defendant to death. The court upheld the Florida statute as constitutional. Under that statute (Fla. Stat. Ann. sec. 782.04 (Supp. 1979) (murder)), a jury may hear evidence in a hearing separate from the trial. At the conclusion of the hearing the jury considers "[w]hether sufficient mitigating circumstances exist *** which outweigh the aggravating circumstances found to exist; and *** [b]ased on these considerations, whether the defendant should be sentenced to life imprisonment or death." (Fla. Stat. Ann. secs. 921.141(2)(b), (c) (Supp. 1979).) The jury's verdict is determined by majority vote. It is only advisory, the actual sentence is determined by the trial court. The court also is required to weigh the statutory aggravating and mitigating circumstances before imposing sentence. There is automatic review by the Supreme Court of Florida, though unlike Georgia, review need not take any specific form. The gist, therefore, of the Georgia, Florida and Texas statutes is that the sentencing authority, be it judge or jury, "must focus on the individual circumstances of each homicide and each defendant" (*Proffitt v. Florida* (1976), 428 U.S. 242, 252, 49 L. Ed. 2d 913, 922, 96 S. Ct. 2960, 2966; see also *Gregg v. Georgia* (1976), 428 U.S. 153, 199, 49 L. Ed. 2d 859, 96 S. Ct. 2909, 2937; *Jurek v. Texas* (1976), 428 U.S. 262, 271, 49 L. Ed. 2d 929, 938, 96 S. Ct. 2950, 2956), which necessarily entails that weight be given to mitigating as well as aggravating circumstances where the death sentence might be imposed. *Lockett v. Ohio* (1978), 438 U.S. 586, 604, 57 L. Ed. 2d 973, 990, 98 S. Ct. 2954, 2965.

The Illinois statute certainly falls within the rule set down by the Supreme Court. Sections 9–1(g) and (h) provide that, once the State has proved the existence of any of the aggravating factors (Ill. Rev. Stat. 1977, ch. 38, par. 9–1(b)), beyond a reasonable doubt (Ill. Rev. Stat. 1977, ch. 38, par. 9–1(f)), a unanimous jury or the court must weigh the mitigating factors against the aggravating factors and must conclude that no mitigating factors sufficiently preclude the imposition of the death sentence. Without doubt, a balancing process is required; while the

precise weight to be given each aggravating and mitigating factor is not made a matter of numerical calculation, that is not a constitutional infirmity. Rather, since the sentencing authority is presented specific evidence to weigh, based upon the particular facts and circumstances of the case, any "'discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application.'" *Gregg v. Georgia* (1976), 428 U.S. 153, 198, 49 L. Ed. 2d 859, 888, 96 S. Ct. 2909, 2936, quoting *Coley v. State* (1974), 231 Ga. 829, 834, 204 S.E.2d 612, 615. As stated in *Proffitt*: "While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of *Furman* are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." *Proffitt v. Florida* (1976), 428 U.S. 242, 258, 49 L. Ed. 2d 913, 926, 96 S. Ct. 2960, 2969.

Several mitigating factors were considered by the court. It made the following findings: The court found, as factors not enumerated in the statute, that the defendant voluntarily confessed to the offenses of which he was convicted; that the defendant had a stable work record, held a responsible job and supported his family; that the defendant served in the armed forces and was honorably discharged; that the defendant might receive aid from his family; and that the defendant had stated that he possessed religious convictions. The court also made findings as to the absence of statutory mitigating factors. Specifically the court found that the defendant was "personally present during the commission of the act[s]" causing death; that the defendant did not act "under compulsion of threat, or menace of the imminent infliction of death or great bodily harm"; that the murdered individual was not "a participant in the defendant's homicidal conduct" or consent to the defendant's homicidal act; that the defendant did not act under the influence of an extreme mental or emotional disturbance but rather by "a deliberate methodical design"; and, finally, that since the defendant, at the time of sentencing in this matter, had been recently convicted of, but not sentenced for, attempted murder and rape in the circuit court of Winnebago County, and had a history of lesser offenses, the defendant had a significant history of prior criminal activity.

The trial court found beyond a reasonable doubt the existence of two aggravating factors. We have upheld the finding of the court that a murder was committed in the

course of the felonies of aggravated kidnapping and rape. The other aggravating factor found by the court we have concluded, as a matter of statutory interpretation, did not exist. Thus, we deem it necessary to a complete and fair sentencing hearing that we vacate the sentence of death and remand this cause to the circuit court for a new sentencing hearing, as to the imposition of the death penalty only; the sentences for the other offenses will stand. The partial resentencing hearing is essential because of the profound importance we attach to the trial court's role in weighing aggravating and mitigating factors. In this instance, the trial court weighed an aggravating factor which we have concluded figured erroneously in the court's sentencing decision. We have now removed that factor from the scale. Whether the scale will remain stable or will tip as a result of our conclusion is initially for the trial court to determine. For us either to affirm or reverse the trial court's sentence, without providing the trial court an opportunity to resentence in light of our conclusion of law, would usurp the trial court's function as the sentencing authority. Needless to say, we in no way intimate what the trial court's sentence, upon remand, should be. That decision must be left to the trial court since it was the court which saw and heard the evidence and is best able to impose an appropriate sentence.

The next issue we consider is whether the defendant's waiver of a jury proceeding at the sentencing hearing was knowing and understanding. The defendant specifically avers that the defendant was not aware that one juror's belief that no aggravating factor had been established beyond a reasonable doubt, or that a mitigating factor sufficient to preclude the imposition of the death penalty had been proved, "would terminate the death penalty proceedings against him." Without deciding whether a defendant must always be made aware of the foregoing before he may make a knowing waiver of a jury proceeding, we conclude that the record reveals that the defendant in this case was so informed by the court:

> "THE COURT: Let me explain to you that there is a very important provision in the law which states that you have a right to have a trial by jury on the question of whether a death penalty is to be imposed. That right cannot be taken away from you unless you actually knowingly waive the right to have a jury trial. If you waive the right then a Judge will hear the same evidence that would be heard before a jury. However, instead of having twelve jurors reach a *unanimous verdict of 12--0* the Judge alone would make the decision upon hearing the evidence. If you wish to avail yourself of the right to have the jury trial you are entitled to do that. Is that essentially what has been explained to you by your Attorneys?
>
> DEFENDANT: Yes, completely." (Emphasis added.)

We perceive that the foregoing, especially the phrase "unanimous verdict of 12—0," amply informed the defendant of the fact that one juror's belief that the statutory requirements had not been met could preclude the imposition of the death sentence. Moreover, the defendant was ably represented by counsel, who explained the procedure to the defendant. We think the defendant made a knowing and understanding waiver of the right to have a jury proceeding.

We next turn to the defendant's contention that the trial court erred in the sentencing hearing when it concluded that the defendant had proved no mitigating factor sufficient to preclude imposition of the death sentence. Specifically the defendant argues two points: first that proof of any one of the five statutory mitigating factors always precludes the imposition of the death sentence; and, second, that the defendant proved the existence of the following statutory mitigating factor: "the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, although not such as to constitute a defense to prosecution." (Ill. Rev. Stat. 1977, ch. 38, par. 9—1(c)(2).) Thus, argues the defendant, he may not be sentenced to death.

We do not agree that the proof of one statutory mitigating factor always precludes the imposition of the death sentence, as defendant contends. We have reviewed the remarks made on the floor of the Illinois House of Representatives which defendant claims support his contention. We do not think they are controlling, because the statute itself provides a weighing process is to be performed between the aggravating and mitigating factors. (Ill. Rev. Stat. 1977, ch. 38, pars. 9—1(g), (h).) Moreover, the Supreme Court, in interpreting statutes similar to our own, has repeatedly and approvingly emphasized that a weighing process must take place. (*Gregg v. Georgia* (1976), 428 U.S. 153, 49 L. Ed. 2d 859, 96 S. Ct. 2909; *Proffitt v. Florida* (1976), 428 U.S. 242, 251, 49 L. Ed. 2d 913, 922, 96 S. Ct. 2960, 2966; *Lockett v. Ohio* (1978), 438 U.S. 586, 608, 57 L. Ed. 2d 973, 992, 98 S. Ct. 2954, 2966-67.) Therefore, we hold that the proof of one mitigating factor, by itself, will not always preclude the imposition of the death sentence. Instead, the sentencing authority should carefully weigh the factors, aggravating and mitigating, in order to reach a fair and just result, one that is based on the particular circumstances of the offense and the defendant. See *Proffitt v. Florida* (1976), 428 U.S. 242, 252, 49 L. Ed. 2d 913, 922, 96 S. Ct. 2960, 2966.

We now consider the defendant's second argument, that the court erred in finding that the defendant was not

under the influence of an extreme mental or emotional disturbance at the time the murder was committed. At the sentencing hearing, the court heard the testimony of four psychiatrists. One of the doctors, Albert H. Stipes, described the defendant to be suffering from "[s]chizophrenia, latent type and multiple sexual deviations." The doctor further testified that the defendant has acted under extreme mental disturbance most of his life, particularly during times of stress. The doctor also stated that the defendant has a personality disorder which may show itself by rage. In addition, the doctor testified that the defendant was under an extreme mental disturbance at the time he committed the murder, one which was caused by a "build-up" of stress. However, the doctor testified he was told nothing by the defendant about the cause of any stress the defendant may have been experiencing on the night the murder was committed.

Dr. Leroy Levitt was also called by the defendant to testify. He stated that he diagnosed that the defendant had "a severe personality disorder, passive-aggressive type, with multiple sexual deviances." Dr. Levitt also agreed with Dr. Stipes' testimony that the defendant suffers from stress which results in an uncontrollable need to discharge his feelings. Dr. Levitt further stated that the defendant acted under an extreme mental disturbance at the time of the murder in that his violent reaction to stress is much greater than for many other people. The doctor additionally said that he did not know and did not ask the defendant what precipitating event caused the defendant to murder the victim.

The State called Dr. J. G. Graybill to testify as a rebuttal expert witness. Dr. Graybill agreed with the other two witnesses that the defendant is of a "passive-aggressive personality with sexual deviation." Dr. Graybill did not, however, believe the defendant acted under the influence of an extreme mental or emotional disturbance at the time of the murder. Lastly, Dr. Carl Hamann was called to testify. He diagnosed the defendant's condition as a character disorder, passive-aggressive personality with sexual deviation, a personality disorder. Dr. Hamann also offered the opinion that the defendant was not under the influence of an extreme mental or emotional disturbance at the time of the murder.

The court in sentencing the defendant stated that, in its view of the testimony of the four expert witnesses and the other evidence, there was no showing that on September 22, 1977, the defendant was under the influence of an extreme mental or emotional disturbance. The court concluded that the manner in which the defendant comported himself before, during and after the murder indicated a "deliberate methodical design."

There is no reason to set aside the finding of the trial judge. It is supported by the evidence. While in a case of this gravity this court will make a separate evaluation of the record, we should not lightly overturn the findings of the trial court, particularly when they are amply supported by the record. (See, *e.g.*, *People v. Myers* (1966), 35 Ill. 2d 311, 340-41.) Therefore the finding of the trial court that the defendant did not commit murder while under the influence of an extreme mental or emotional disturbance will be sustained.

Another contention made by the defendant is that the trial court erred when it denied his motion for the appointment of experts to compile data and to testify concerning the proportionality of his sentence and his prospects for rehabilitation. Defendant's motion alleged such testimony was necessary in order to provide an adequate basis for this court's review, apparently so that we might be better able to determine whether death sentences were being imposed "in an arbitrary and capricious manner" or "to a particular type of defendant." While we agree that the Supreme Court envisages, as defendant phrases it, a "proportionality review" by us, we do not interpret *Gregg v. Georgia* (1976), 428 U.S. 153, 49 L. Ed. 2d 859, 96 S. Ct. 2909, *Proffitt v. Florida* (1976), 428 U.S. 242, 49 L. Ed. 2d 913, 96 S. Ct. 2960, or *Jurek v. Texas* (1976), 428 U.S. 262, 49 L. Ed. 2d 929, 96 S. Ct. 2950, as requiring that review to be predicated upon expert testimony. Defendant has not indicated, nor do we perceive, how such testimony can be of material assistance to either the trial judge or us. The imposition of sentence in a murder case is a judicial function, the performance of which would not normally be assisted by expert testimony as to what would constitute a "proportional" sentence in a given case. And we, of course, in reviewing all death cases will be in a position to insure a reasonable degree of rationality and consistency.

The trial court in this case did provide funds for the services of a psychiatrist, Dr. Albert Stipes, and a psychologist. The defendant made no mention during the hearing on his motion of his need for the probation and parole expert, and it seems clear that, even if that testimony were admissible, defendant has established neither the need therefor nor prejudice due to its absence.

The final assignment of error raised by the defendant is whether section 9—1 of the Criminal Code of 1961 (Ill. Rev. Stat. 1977, ch. 38, par. 9—1) offends the eighth and fourteenth amendments to the United States Constitution because it does not provide adequate appellate review procedures to prevent the arbitrary imposition of the death penalty.

Specifically, the defendant argues that the Illinois death penalty statute is defective concerning appellate

review because it does not require a comparison by this court of all the cases in which the death sentence is imposed to determine if the death sentence is being imposed uniformly throughout the State. Additionally, the defendant argues that the Illinois statute does not provide for adequate review because it does not require the sentencing authority to make written findings as to the aggravating and mitigating factors relied upon by the judge or jury in imposing the death sentence. We conclude that the automatic appellate review procedure authorized under the statute is constitutional. Section 9–1(i) provides:

> "(i) Appellate Procedure.
>
> The conviction and sentence of death shall be subject to automatic review by the Supreme Court. Such review shall be in accordance with rules promulgated by the Supreme Court." Ill. Rev. Stat. 1977, ch. 38, par. 9–1(i).

This court has promulgated new rules or has amended existing rules to comply with the statutory directive. (See 73 Ill. 2d Rules 603, 606(a), 607(a), 609(a), 611(a), 613(a).) These rules apply respectively to automatic appeal to the Supreme Court, automatic perfection of appeal in cases in which the death sentence is imposed, appointment of two attorneys for indigent defendants, an automatic stay of sentence until final order of this court, priority in oral argument, and, finally, the mandate of this court, affirming, reversing or modifying the judgment of the trial court. In addition, Rule 615 sets forth a range of powers of a reviewing court from taking cognizance of errors or defects affecting substantial rights even though they were not brought to the attention of the trial court, to reducing the punishment imposed by the trial court. (73 Ill. 2d R. 615.) This court is empowered to do substantial justice in any case, including cases where the death sentence has been imposed. Thus the defendant's argument that section 9–1(i) offends the eighth and fourteenth amendment because it permits arbitrary imposition of the death penalty is substantially weakened.

Moreover, we view the Supreme Court's statements in its recent decisions on the constitutionality of other States' death penalty statutes to be dispositive. In *Gregg v. Georgia* (1976), 428 U.S. 153, 198, 49 L. Ed. 2d 859, 888, 96 S. Ct. 2909, 2937, the court approved the Georgia review procedure which requires that the Supreme Court of Georgia employ a staff of persons to compare Georgia cases in which the death sentence has been imposed. That statute (Georgia Code Ann. sec. 27–2537 (Supp. 1975)) also requires that the court specify in its opinion which cases it took into consideration. Finally, the statute

requires the court to "review every death sentence to determine whether it was imposed under the influence of passion, prejudice, or any other arbitrary factor, whether the evidence supports the findings of a statutory aggravating circumstance, and '[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.'" (*Gregg v. Georgia* (1976), 428 U.S. 153, 204, 49 L. Ed. 2d 859, 892, 96 S. Ct. 2909, 2939.) The Georgia statute also requires the sentencing authority to make written findings as to the "aggravating circumstance or circumstances which it found beyond a reasonable doubt." (Ga. Code Ann. sec. 27–2534.1(10)(c) (Supp. 1975).) We think it significant to note, however, that while the court approved of the Georgia statutory review procedures in *Gregg*, it also approved of the less complex procedures provided for in the Florida and Texas death penalty statutes. See *Proffitt v. Florida* (1976), 428 U.S. 242, 258, 49 L. Ed. 2d 913, 926, 96 S. Ct. 2960, 2969; *Jurek v. Texas* (1976), 428 U.S. 262, 276, 49 L. Ed. 2d 929, 941, 96 S. Ct. 2950, 2958.

The court stated in *Proffitt:* "While it may be true that [the Florida Supreme Court] has not chosen to formulate a rigid objective test as its standard of review for all cases, it does not follow that the appellate review process is ineffective or arbitrary." (428 U.S. 242, 258, 49 L. Ed. 2d 913, 926, 96 S. Ct. 2960, 2969.) The same was held as to the Texas statute. In *Jurek* it was concluded: "By providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law." (428 U.S. 262, 276, 49 L. Ed. 2d 929, 941, 96 S. Ct. 2950, 2958.) The same may be said of the review which will be accorded each similar case before this court. The entire record undergoes scrutiny for errors and defects. The sentencing hearing is reviewed with the object of ascertaining whether any aggravating factors are proved beyond a reasonable doubt. In fact, in the instant case, we have vacated as a matter of law the finding of the trial court that one of the aggravating factors existed. Our review of the entire record also considers whether there are no mitigating factors sufficient to preclude the imposition of the death sentence. There is no indication whatsoever that, in this case or any other, our scrutiny of the record and of the propriety and proportionality of the sentence imposed will not be as vigorous and as observant of constitutional principles as it is required to be.

As to the written findings of the sentencing authority, it is true they are not statutorily mandated. However, in

this case, the transcript of the court's findings in the sentencing hearing provides this court with as equal an opportunity to review the validity of the findings as would written findings.

In the instant case, we are of the opinion that no prejudicial error was commited at trial and that the sentences imposed by the court for the offenses of aggravated kidnapping and rape are justified. The sentence of death is vacated, pending resentencing, in light of our conclusion that one aggravating factor was erroneously included in the court's sentencing decision. In all other respects the judgment of the circuit court of Boone County is affirmed.

Affirmed in part and reversed
in part; sentence vacated;
cause remanded.

51646 SAD-Elgin

ILLINOIS SUPREME COURT
CLELL L. WOODS, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

May 29, 1980

State Appellate Defender
Second Judicial District
63 Douglas Street
Elgin, Illinois 60120

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OFFICE OF THE STATE APPELLATE DEFENDER
ELGIN, ILLINOIS

No. 51646 - People State of Illinois, appellee, vs. Curtis Brownell, appellant. Appeal, Circuit Court (Boone).

The Supreme Court today denied the petition for rehearing in the above entitled cause. The first page of the opinion was modified upon denial of petition for rehearing and a copy of said page is enclosed.

Very truly yours,
Clell L. Woods
Clerk of the Supreme Court

Docket No. 51646—Agenda 5—November 1979.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. CURTIS J. BROWNELL, Appellant.

MR. JUSTICE CLARK delivered the opinion of the court:

In a five-count indictment the defendant, Curtis J. Brownell, was charged with the murder, aggravated kidnapping and rape of Louise M. Betts. Count I charged that the defendant "committed the offense of murder, in that he, without lawful justification and with the intent to kill Louise M. Betts, strangled" her and thereby caused her death. (Ill. Rev. Stat. 1977, ch. 38, par. 9—1(a)(1).) Count II charged that the defendant committed murder by strangling Louise M. Betts, knowing that "such act created a strong probability of death or great bodily harm." (Ill. Rev. Stat. 1977, ch. 38, par. 9—1(a)(2).) Count III charged the defendant with felony murder in that he killed the decedent while attempting or committing the forcible felony of rape (Ill. Rev. Stat. 1977, ch. 38, par. 9—1(a)(3)). Count IV charged the defendant with committing the offense "of Aggravated Kidnaping, in that he, in committing the offense of kidnaping, in violation of Illinois Revised Statutes, chapter thirty-eight, section 10—1(a)(2), knowingly and secretly confined Louise M. Betts against her will and inflicted another felony, to wit: Rape, upon her." Count V charged that the defendant "committed the offense of Rape, in that he, a male person of the age of 14 years and upwards, had sexual intercourse with Louise M. Betts, a female not his wife, by force and against her will." Ill. Rev. Stat. 1977, ch. 38, par. 11—1(a).

On September 13, 1978, after a bench trial, the defendant was found guilty of counts I, III, IV, and V by the circuit court of Boone County. Count II was dismissed on the motion of the State. The judgment of conviction under count III was subsequently vacated. A final judgment of conviction was entered as to counts I, IV and V.

The State requested a sentencing hearing for the purpose of imposing the death penalty pursuant to section 9—1(d) of the Criminal Code of 1961 (Ill. Rev. Stat. 1977, ch. 38, par. 9—1(d)). The defendant waived a jury proceeding and elected to be sentenced by the court. The court sentenced the defendant to two concurrent terms of 30 to 90 years in the penitentiary for the offenses of aggravated kidnapping and rape. The court found that based on the evidence adduced at trial two aggravating factors had been established—that the murdered individual was killed in the course of two other felonies, aggravated kidnapping and rape (Ill. Rev. Stat. 1977, ch. 38, par.

APPENDIX C

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
COUNTY OF BOONE

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff,	)	
vs.	)	78-CF-37
CURTIS J. BROWNELL, Defendant.	)	ORDER

This cause coming on to be heard on the Defendant's Motion to Suppress Statements, the court having heard the evidence and arguments of counsel, finds as follows:

1. There is no sufficient evidence of coercion to result in an order suppressing the written statement given in this case.

2. The defendant did wish to make a statement to the police in the early morning hours of April 2, 1978 and had desired to do such for anywhere from 12 to 24 hours preceding that time.

3. Considering all of the evidence leading up to the giving of the statement, the defendant knowledgeably and voluntarily made the written statement, which has been marked and identified at this hearing as People's Exhibit #2.

4. Defendant had adequate opportunities to discuss the giving of said statement with his attorney, his minister, and his wife prior to the time he gave the statement.

5. Although the defendant was in a mental state of distress, this distress did not result from any police coercion or activity and was not of such magnitude as to prevent the defendant from understanding the nature and consequences of his waiver and statement to the police.

6. Defendant was fully and completely advised of his miranda rights prior to the statement, he understood those rights, and he made a knowing and understanding waiver of those rights prior to giving this statement to the police.

7. The statement given to the police by the defendant which has been marked and identified for purposes of this hearing as People's Exhibit #2 was given freely and voluntarily by the defendant.

8. Any oral statements made by the defendant or physical reactions at the time of his questioning by the police on March 31, 1978, which followed his request to speak to an attorney are inadmissible because an attorney was not provided for the defendant.

IT IS THEREFORE ORDERED BY THE COURT that the Defendant's Motion to Suppress written and oral statements is denied as to the statement given by the defendant on April 2, 1978, which has been marked and identified as People's Exhibit #2 for purposes of this hearing.

IT IS FURTHER ORDERED BY THE COURT that the Defendant's Motion to Suppress written and oral statements is granted as to the showing of the photograph of Louise Betts to the defendant on March 31, 1978 and any statements or reactions by the defendant following his request to speak to an attorney on that date are suppressed.

Dated: July 3, 1978.

ENTER:

Dale Ball

JUDGE

Nov 3, 1978 nunc pro tunc July 3, 1978

Dale Ball

FILED
BOONE COUNTY, MISSOURI

Nunc Pro Tunc July 3 1978

APPENDIX D

Ill. Rev. Stat., 1977, Ch. 38, 59-1:

(a) A Person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:

(1) He either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or

(2) He knows that such acts create a strong probability of death or great bodily harm to that individual or another; or

(3) He is attempting or committing a forcible felony other than voluntary manslaughter.

(b) Aggravating factors. A defendant who at the time of the commission of the offense has attained the age of 18 or more and who has been found guilty of murder may be sentenced to death if:

1. the murdered individual was a peace officer or fireman killed in the course of performing his official duties and the defendant knew or should have known that the murdered individual was a peace officer or fireman; or

2. the murdered individual was an employee of an institution or facility of the Department of Corrections, or any similar local correctional agency, killed in the course of performing his official duties, or the murdered individual was an inmate at such institution or facility and was killed on the grounds thereof, or the murdered individual was otherwise present in such institution or facility with the knowledge and approval of the chief administrative officer thereof; or

3. the defendant has been convicted of murdering two or more individuals under subsection (a) of this Section or under any law of the United States or of any state which is substantially similar to Subsection (a) of this Section regardless of whether the deaths occurred as the result of the same act or of several related or unrelated acts so long as the deaths were the result of either an intent to kill more than one person or of separate premeditated acts; or

4. the murdered individual was killed as a result of the hijacking of an airplane, train, ship, bus or other public conveyance; or

5. a defendant committed the murder pursuant to a contract, agreement or understanding by which he was to receive money or anything of value in return for committing the murder or procured another to commit the murder for money or anything of value; or

B. the defendant was convicted after a trial before the court sitting without a jury; or

C. the court for good cause shown discharges the jury that determined the defendant's guilt; or

3. before the court alone if the defendant waives a jury for the separate proceeding.

(e) Evidence and Argument. During the proceeding any information relevant to any of the factors set forth in Subsection (b) may be presented by either the State or the defendant under the rules governing the admission of evidence at criminal trials. Any information relevant to any additional aggravating factors or any mitigating factors indicated in Subsection (c) may be presented by the State or defendant regardless of its admissibility under the rules governing the admission of evidence at criminal trials. The State and the defendant shall be given fair opportunity to rebut any information received at the hearing.

(f) Proof. The burden of proof of establishing the existence of any of the factors set forth in Subsection (b) is on the State and shall not be satisfied unless established beyond a reasonable doubt.

(g) Procedure--Jury. If at the separate sentencing proceeding the jury finds that none of the factors set forth in Subsection (b) exists, the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections.[1] If there is a unanimous finding by the jury that one or more of the factors set forth in Subsection (b) exist, the jury shall consider aggravating and mitigating factors as instructed by the court and shall determine whether the sentence of death shall be imposed. If the jury determines unanimously that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the court shall sentence the defendant to death. Unless the jury unanimously finds that there are no mitigating factors sufficient to preclude the imposition of the death sentence the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections.

(h) Procedure--No Jury. In a proceeding before the court alone, if the court finds that none of the factors found in subsection (b) exists, the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections.

If the Court determines that one or more of the factors set forth in Subsection (b) exists, the Court shall consider any aggravating and mitigating factors as indicated in Subsection (c). If the Court determines that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the Court shall sentence the defendant to death.

Unless the court finds that there are no mitigating factors sufficient to preclude the imposition of the sentence of death, the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections.

[1]Chapter 38, Section 1005-1-1 et seq.

6. the murdered individual was killed in the course of another felony if:

(a) the murdered individual was actually killed by the defendant and not by another party to the crime or simply as a consequence of the crime; and

(b) the defendant killed the murdered individual intentionally or with the knowledge that the acts which caused the death created a strong probability of death or great bodily harm to the murdered individual or another; and

(c) the other felony was one of the following: armed robbery, robbery, rape, deviate sexual assault, aggravated kidnapping, forcible detention, arson, burglary, or the taking of indecent liberties with a child; or

7. the murdered individual was a witness in a prosecution against the defendant, gave material assistance to the state in any investigation or prosecution of the defendant, or was an eye witness or possessed other material evidence against the defendant.

(c) Consideration of factors in Aggravation and Mitigation. The court shall consider, or shall instruct the jury to consider any aggravating and any mitigating factors which are relevant to the imposition of the death penalty. Aggravating factors may include but need not be limited to those factors set forth in subsection (b). Mitigating factors may include but need not be limited to the following:

1. the defendant has no significant history of prior criminal activity;

2. the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, although not such as to constitute a defense to prosecution;

3. the murdered individual was a participant in the defendant's homicidal conduct or consented to the homicidal act;

4. the defendant acted under the compulsion of threat or menace of the imminent infliction of death or great bodily harm;

5. the defendant was not personally present during commission of the act or acts causing death.

(d) Separate sentencing hearing. Where requested by the State, the court shall conduct a separate sentencing proceeding to determine the existence of factors set forth in Subsection (b) and to consider any aggravating or mitigating factors as indicated in Subsection (c). The proceeding shall be conducted:

1. before the jury that determined the defendant's guilt; or

2. before a jury impanelled for the purpose of the proceeding if:

A. the defendant was convicted upon a plea of guilty; or

(i) Appellate Procedure. The conviction and sentence of death shall be subject to automatic review by the Supreme Court. Such review shall be in accordance with rules promulgated by the Supreme Court.

(j) Disposition of reversed death sentence. In the event that the death penalty in this Act is held to be unconstitutional by the Supreme Court of the United States or of the State of Illinois, any person convicted of murder shall be sentenced by the court to a term of imprisonment under Chapter V of the Unified Code of Corrections.

In the event that any death sentence pursuant to the sentencing provisions of this Section is declared unconstitutional by the Supreme Court of the United States or of the State of Illinois, the court having jurisdiction over a person previously sentenced to death shall cause the defendant to be brought before the court, and the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections.

Ill. Rev. Stat., 1977, Ch. 38, §1005-5-3(c)(1):

When a defendant is found guilty of murder the State may either seek a sentence of imprisonment under Section 5-8-1 of this Code, or where appropriate seek a sentence of death under Section 9-1 of the Criminal Code of 1961.

APPENDIX E

LIST A

Prosecutor requested hearing, then adjourned it while jury deliberating.

People v. Hipkins, Ill. Ct. App. (3rd Dist.) (Appeal pending)

People v. Robinson, Ill. Ct. App. (3rd Dist.) (Appeal pending)

LIST B

Sentencing authority refused to authorize imposition of death sentence.

People v. Earl Allen, Cook County, appeal pending to the Appellate Court, 1st District, No. 80-266 (double murder) (bench); 100-300 years;

People v. Thomas Crowder, Cook County, No. 78-I-7198 awaiting hearing on post-trial motions (murder-aggravated kidnapping) (jury); 60 years;

People v. Donald Winston, DuPage County, No. 79CF1651, awaiting hearing on post-trial motions (murder-robbery) (jury);

People v. Jesse Goodman, Winnebago County, No. 79CF739, appeal pending to the Appellate Court, 2d District (murder-armed robbery) (bench);

People v. Gregory Bush, St. Clair County, appeal pending to to the Appellate Court, 5th District, No. 80-70 (double murder) (jury).

Prosecutor declined to request capital sentencing hearing where aggravating factor(s) present.

People v. Vlasios Karas, Cook County; on appeal to the Appellate Court, 1st District, No. 78-1563 (double murder); 100-300 years;

People v. Kenneth Adams, Cook County, appeal pending to the Appellate Court, 1st District, No. 79-565 (double murder, rape-murder); State sought penalty as to two co-defendants: Dennis Williams was sentenced to die; Willie Rainge was sentenced to natural life; Kenneth Adams, to 75 years;

People v. Jimmie Lee Schlemm, Menard County, appeal pending to the Appellate Court, 4th District, No. 15440 (double murder); 76 years;

People v. Jerome Hawkins, St. Clair County No. 77CF550, affirmed on appeal to the Appellate Court, 5th District, No. 78-243 (murder-armed robbery); 14-20 years;

People v. Gregory Bowman, St. Clair County, appeal pending to the Appellate Court, 5th District, No. 80-29 (murder-rape); Life;

People v. Randall Keagbine, Pope County, affirmed on appeal to the Appellate Court, 5th District, No. 78-288 (murder-armed robbery); 30 years.

People v. Tony Issac, Cook County, appeal pending to the Appellate Court, 1st Distrcit, No. 79-1529 (murder-aggravated kidnapping); 26 years;

People v. Edward Wierzbicki, Cook County, appeal pending to the Appellate Court, 1st District, No. 80-284 (murder-aggravated kidnapping); 80 years;

People v. Ellis McInnis, Cook County, appeal pending to the Appellate Court, 1st District, No. 79-27 (murder-armed robbery); 25-40 years;

People v. Bernard Cooper, Cook County, appeal pending to the Appellate Court, 1st District, No. 79-1911 (murder-armed robbery-aggravated kidnapping); 100-200 years;

People v. Johnny McKibbons, Cook County, appeal pending to the Appellate Court, 1st District, No. 79-2414 (murder-armed robbery); 40 years;

People v. Mary Eadler, Kane County No. 78CF58637; appeal pending to the Appellate Court, 2d District, No. 79-366 (murder-armed robbery); 20 years;

People v. Duane Ingram, Winnebago County No. 76CF309, appeal pending to the Appellate Court, 2d District, No. 79-327 (murder-armed robbery); 20-50 years;

People v. Orlando Moore, Winnebago County No. 77/10CF466, appeal pending to the Appellate Court, 2d District, No. 78-353 (murder-rape); 25-50 years;

People v. David Ulrich, Winnebago County No. 78CF386, appeal pending to the Appellate Court, 2d District, no. 79-166 (murder-armed robbery); 45 years;

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-5122

CURTIS BROWNELL,

Petitioner,

vs.

THE STATE OF ILLINOIS,

Respondent.

ORIGINAL COPY

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

RESPONDENT'S BRIEF IN OPPOSITION

TYRONE C. FAHNER
Attorney General
State of Illinois

MELBOURNE A. NOEL, JR.,

CAROLYN B. NOTKOFF,
Assistant Attorneys General
188 W. Randolph Street (Suite 2200)
Chicago, Illinois 60601
(312) 793-2570

Counsel for Respondent

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IN THE
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CURTIS BROWNELL,

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THE STATE OF ILLINOIS,

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, the State of Illinois, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Illinois Supreme Court's opinion in this case. That opinion is reported at 79 Ill.2d 508, 404 N.E.2d 181.

JURISDICTION
(absence thereof)

Petitioner has invoked the jurisdiction of this Court under 28 U.S.C. § 1257(3). Respondent submits that the decision of the court below is not ripe for review by this Court. The final judgment in a criminal case is the sentence. Berman v. United States, 302 U.S. 211, 212 (1937). The Illinois Supreme Court has vacated petitioner's sentence of death, remanding the case for resentencing, and thus there has been no final determination of the merits of the case. Since litigation between the parties has not yet been terminated, review by this Court at this stage of the proceedings would be premature. Id. at 213.

QUESTIONS PRESENTED

Whether the decision of the Illinois Supreme Court that petitioner was not interrogated accords with the decisions in Rhode Island v. Innis and Michigan v. Mosley?

Whether the Illinois Supreme Court correctly concluded that petitioner had effectively waived his right to counsel, where petitioner met extensively with his counsel but later, knowingly waived counsel's presence?

Whether petitioner can be sentenced to death after confessing where there was no outstanding offer of leniency and petitioner also rejected such an offer?

Whether the mitigating factor listed in the Illinois death penalty statute as "extreme mental or emotional disturbance" adequately guides the sentencing authority where the statute further describes this factor as "not such as to constitute a defense to prosecution" and allows the introduction into evidence of any other relevant mitigating factors?

Whether the Illinois Supreme Court correctly concluded that a prosecutor's discretion to request a death sentencing hearing does not violate the eighth amendment where the prosecutor's discretion is guided by the statute and by the strength of his case?

STATEMENT OF THE CASE

Respondent wishes to add the following facts omitted by petitioner:

On the evening of April 1, 1978, at approximately 10:00 p.m., petitioner's counsel indicated that he wished to open negotiations with prosecutors regarding the death penalty and whether it would be sought in the case. (A. 108-109) At about 10:30 p.m. it was agreed among the parties that the following deal would be struck: if petitioner would give the police a complete, written statement concerning his role in the victim's death, the State would not seek the death penalty at his trial. (A. 122) Significantly, this offer was not open-ended; rather, the prosecutors expressly limited the offer so that petitioner would be required to give his statement "at that time, right now." (A. 122)

One of petitioner's attorneys then met with him alone for about fifteen minutes. (A. 109) A police detective was then summoned and informed, by petitioner and his counsel, that petitioner had declined the offer. (A. 109, 137) Petitioner's attorney later repeated to both the police (A. 109) and the prosecuting authorities (C. 276, 323) his client's refusal to accept the offered deal. After once again ascertaining that petitioner would refuse to speak to anyone but his lawyers, (A. 137) the parties left for the evening between midnight and 1:00 a.m. (A. 110-111)

Approximately one hour later, petitioner summoned the detectives assigned to this case. (A. 100) Once they had arrived at his cell, petitioner stated that he wished to give them a statement. When asked if his lawyers should be present, petitioner stated they should not be summoned because they would not "let me tell you everything I want to tell you." (A. 123) The police next asked petitioner why he had refused to confess earlier in the evening, when he could have bargained his way out of a possible death penalty. Petitioner said he rejected that "deal" because he wanted "to burn". (A. 111, 123, 143) Thereupon, after being fully admonished as to his fifth and sixth amendment rights, petitioner confessed to

murder. (A. 111) After confessing, he inquired if he had told the police "enough so that he could burn." (A. 112)

REASONS FOR DENYING THE WRIT

(In Addition To Lack Of Ripeness Mentioned In "Jurisdiction" Section, Supra.)

I.

THE DECISION OF THE ILLINOIS SUPREME COURT REFLECTS THAT PETITIONER WAS NOT INTERROGATED ON APRIL 2, 1978, IN VIOLATION OF RHODE ISLAND V. INNIS and MICHIGAN V. MOSLEY.

Prior to this Court's decision in Rhode Island v. Innis, ___U.S.___, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980), the Illinois Supreme Court held that petitioner's right to remain silent and right to counsel were properly observed and rejected his argument that his waiver of these rights "was defective due to the 'affirmative, repeated efforts' of the detectives to obtain a confession." People v. Brownell, 79 Ill.2d 508, 521, 404 N.E.2d 181, 188 (1980). The court found that "the detectives did not coerce or threaten the [petitioner] into speaking with them" and that "most of the attempts they made to persuade the [petitioner] to confess were made in the presence of counsel." Id., 404 N.E.2d at 188. Respondent submits this decision is consistent with the principles set forth in Innis as well as those in Michigan v. Mosley, 423 U.S. 96 (1975), two cases delineating the rights previously established in Miranda v. Arizona, 384 U.S. 436 (1966).

In Innis, this Court concluded "that the Miranda safeguards come into play whenever a person in custody is subject either to express qeustioning or its functional equivalent." Innis, ___U.S. at ___, 100 S.Ct. at 1689, 64 L.Ed.2d at 307-8. The definition of interrogation extends "only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response." Id. at ___, 100 S.Ct. at 1690, 64 L.Ed.2d at 308 (emphasis in original). The admissibility of statements obtained after the person in custody has chosen to remain silent "depends under Miranda whether his 'right to cut off questioning' was 'scrupulously honored.'" Mosley, 423 U.S. at 104. Nothing in Mosley suggests that all statements

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made subsequent to a decision to remain silent are to be excluded. Id. at 102-3. Rather, the decision makes clear that there are no per se proscriptions of infinite duration upon further questioning. Id.

The facts of the instant case belie petitioner's assertion that law enforcement officials did not scrupulously honor his rights, but affirmatively acted to obtain a confession and circumvent his right to counsel. With the exception of the showing of the photograph of the victim, Louise Betts, to petitioner after he requested counsel, no other police activity in any manner violated his constitutional rights. The trial court suppressed all testimony concerning the showing of the photograph to petitioner (A. 9) and that issue is not before this Court. That incident however took place at 2:15 p.m. on March 31, 1978, some thirty-six hours prior to petitioner's confession. During that thirty-six hour period, petitioner was represented by counsel and given numerous opportunities to discuss with counsel and others what actions to take. In fact, at no time during that thirty-six hour period was petitioner specifically questioned about the Betts' murder by any law enforcement authorities. (A. 140) Even though an initial violation of petitioner's rights had occurred, the effect of this violation was fully dissipated by lapse of time, repeated admonitions, and consultations with counsel so as to render the statement of April 2, 1978 a voluntary statement. Thus petitioner's right to cut off questioning was not violated. Mosley, 423 U.S. at 101 n. 8, 102-3.

The record is clear that the questioning of March 31, 1978 ended immediately upon petitioner's request for counsel. At 6:15 that evening, petitioner accompanied by counsel appeared in a line-up. (A. 134) While Detective Arbisi did advise petitioner that he had a right to talk to detectives either with or without his attorney (A. 135) this statement cannot logically be considered interrogation or an attempt to coerce petitioner into making a statement. Indeed, Detective Arbisi correctly advised petitioner that he could waive his attorney's presence and advise and speak with police officers

if he so desired. See Johnson v. Zerbst, 304 U.S. 458 (1938). Rights enumerated under the sixth amendment are rights personal to the accused and not to counsel. Faretta v. California, 422 U.S. 806 (1975).

The record supports the Illinois Supreme Court's holding that petitioner's rights to remain silent and to counsel were not encroached upon. Prior to and after the line-up on March 31, petitioner spoke with counsel for as long as he wished. (A. 140) He further acknowledged that from that evening until the next no one attempted to talk to him about the instant case. (A. 140) Petitioner spoke with counsel on several occasions on the evening of April 1 and indicated that these interviews lasted as long as he wished. (C. 383-4; A. 136, 140).

Finally, petitioner's own testimony clearly indicates that his decision to make a statement was made with knowledge that his attorney could be present and with a desire on his part to proceed without counsel:

> Q. When Detective Arbisi and Sergeant Packard came to the jail area that morning around two or two-thirty that morning on April 2nd, isn't it true that one of the first things they said to you was to ask if you wanted them to call your attorney?
>
> A. Yes.
>
> Q. And isn't it true that you said no, you didn't want them to call him because he would keep you from saying what you wanted to say?
>
> A. Yes.

(C. 389) Defendant also acknowledged that his Miranda rights were read to him before he gave a statement and that he understood these rights. (A. 142)

Petitioner claims that certain "tactics engaged in by the State" amounted to interrogation. Petition at 14. The People respond that these actions do not violate the precepts in Innis and thus review by this Court is unnecessary. For example, the placement of petitioner in "isolation" or "I-block" (A. 186) was not to elicit an incriminating response but to prevent petitioner from committing suicide. (A. 139) The police officers reasonably believed that a comment

petitioner had made referred to a possible suicide attempt. (A. 186) Informing petitioner that he could talk to the police with or without counsel present was correct advise (see p. 6-7, supra) given in the presence of his attorney, (A. 110, 131, 135, 141) certainly not a situation likely to evoke a confession.

Although petitioner complains that the State arranged for him to meet with his wife before allowing him to see his lawyer, this did not actually transpire. Rather, petitioner met with his wife after he conferred with his lawyer. (A. 136)

While it is true that the State offered to forego the death penalty if petitioner would give a statement, this was not an open-ended offer but limited to "that time, right now." (A. 122) Furthermore, petitioner refused the offer (A. 109, 123, 143) and when he later confessed, he himself indicated he was not doing so within the context of the offer. (A. 143) Petitioner had unlimited opportunity to assess with counsel the advantages and disadvantages of the State's offer and any possible coercive impact of this offer of leniency was dissipated by the advise of counsel. See Brady v. United States, 397 U.S. 742, 754 (1970). Not only was the State's offer not inherently unconstitutional, see id. at 755, no agreement was ever reached between the parties.

Thus, respondent submits that review by this Court is unwarranted as none of the State's actions amounted to interrogation. Furthermore, petitioner misconstrues this Court's holding in Innis. Innis not only addressed the meaning of "interrogation" under Miranda, it clarified when the Miranda safeguards are required:

> It is clear therefore that the special procedural safeguards outlined in Miranda are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation. 'Interrogation,' as conceptualized in the Miranda opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself. [Footnote omitted]
>
> We conclude that the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.

Innis, ___U.S. at ___, 100 S.Ct. at 1689, 64 L.Ed.2d at 307-8. Petitioner in this case was made completely aware of his Miranda rights by police and was advised by counsel throughout the period in question. His rights under Miranda, Mosley, and Innis were never infringed upon during the taking of his confession, thus obviating further review by this Court.

II.

THE ILLINOIS SUPREME COURT CORRECLTY DECIDED THAT PETITIONER'S RIGHT TO COUNSEL WAS PROPERLY OBSERVED.

A.

Petitioner Effectively Waived His Right To Counsel.

Petitioner urges this Court to consider whether an accused is cloaked with a sixth amendment right to counsel when, "during its interrogationl of the accused, the State offers" not to seek the death penalty in exchange for the accused's confession. Petition at 16. However, this is not the issue here, for it is clear from the record and opinion below that petitioner was afforded his right to counsel but later effectively waived it.

Petitioner cites no authority, for there is none, that prohibits one charged with a crime from voluntarily giving a statement to law enforcement authorities after he has been advised of his constitutional rights. Here petitioner was not only warned, but, other than an initial Mosley violation, see Brownell, 79 I11.2d at 519, 404 N.E.2d at 187, petitioner's request for counsel was honored and there was no interrogation. Petitioner met extensively with counsel (A. 136, 140) and nothing in the record supports his allegations that he was unaware of the consequences of his confession and the intricacies of the law.

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1. Respondent submits, as previously discussed in Argument I of this brief, that petitioner was not "interrogated." See pp. 6-7 , supra.

Petitioner initiated the proceedings leading up to the confession (A. 142) and the statement was taken only after he expressed a desire to give it without the presence of counsel. (A. 143) Furthermore, petitioner explicitly refused the State's offer of leniency prior to confessing. (A. 143)

Respondent contends that the court below[2] correctly determined that petitioner waived his right to counsel in a knowing, intelligent, and voluntary manner. See Johnson v. Zerbst, 304 U.S. 458, 464-5 (1938). The facts and circumstances of this case, as discussed previously and as set forth in the Illinois Supreme Court's opinion, Brownell, 79 Ill.2d at 517-9, 404 N.E.2d at 186-7, demonstrate that petitioner requested, and consulted exensively with, counsel but later competently waived counsel's presence. Prior to recording petitioner's confession, Detective Arbisi asked petitioner whether he wished to have his attorney present (A. 111) and apprised him of his Miranda rights. (A. 112) Petitioner's earlier meetings with counsel as well as these warnings by the detective dispel any notion that petitioner's waiver of his right to counsel was not competent. Petitioner was well aware of his rights and had previously exercised them. Nothing prohibits him from later intentionally abandoning these rights. Therefore, since no violation has occurred, this Court should deny the petition for certiorari.

B.

The Allegedly Conflicting Decisions Cited By Petitioner Are Distinguishable On Their Facts.

Petitioner submits that the decision of the Illinois

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2. The trial court's finding that petitioner's confession was voluntary (A. 148, 211-2) encompasses an implied finding that petitioner was afforded counsel but later waived counsel's presence. (A. 211)

Supreme Court in this case that petitioner's right to counsel was not violated conflicts with the recent decision of United States v. Henry, ___U.S.___, 100 S.Ct.____, 65 L.Ed.2d 115 (1980) and United States v. Morrison, 602 F.2d 529 (3d Cir. 1979), cert. granted, 27 Cr. L. Rptr. 4122 (No. 79-395, June 30, 1980). However, both these cases are easily distinguishable on their facts.

In Henry, the accused, while in custody and after indictment, made incriminating statements to his cellmate, an undisclosed government informant. This Court found the admission of these statements at trial violated Henry's sixth amendment right to assistance of counsel. The fact situation in the instant case, wherein petitioner consulted extensively with counsel and later made a confession to known law enforcement officers, is entirely different than that in Henry where the accused made incriminating statements to an undisclosed government informant. Thus, petitioner's reliance on Henry is misplaced.

The facts in Morrison make it inapplicable to the case at bar. Morrison involved repeated forceful and wilful intrusions by government agents into a defendant's home. These intrusions occurred outside the presence of defendant's counsel and were designed to destroy her confidence in her attorney. Again, the facts in the case now before the Court clearly do not amount to a similarly egregious situation.

The decisions of the court below does not conflict with the decisions in Henry and Morrison, those decisions being distinguishable on their facts. Therefore, granting certiorari in this case would be inappropriate.

III.

NO PRINCIPLE OF LAW REQUIRES THE PRECLUSION OF A DEATH PENALTY SENTENCING HEARING MERELY BECAUSE PETITIONER CONFESSED AFTER REJECTING AN OFFER OF LENIENCY.

Petitioner asserts that due process and the attendant concept of fundamental fairness preclude capital punishment in his case. In so arguing, he places great emphasis on Santobello v. New York, 404 U.S. 257 (1971).

Santobello bears little, if any, application to this case. There, the defendant "'bargained' and negotiated" for a guilty plea to a lesser-included offense; the prosecution promised not to recommend a sentence. Id. at 262. An agreement was in fact reached between the parties. Because no such agreement was ever settled upon here, there is no agreement which could be breached or enforced, and Santobello is thus inapposite. The prosecutor here was never committed to a particular course of conduct.

A guilty plea is not rendered invalid because it resulted from a defendant's desire to avoid the possibility of the death penalty. North Carolina v. Alford, 400 U.S. 25 (1970); Brady v. United States, 397 U.S. 742 (1970). Surely, there is nothing inherently unconstitutional about negotiations between the State and the accused wherein a defendant agrees to waive his constutitional rights in return for a promise by the prosecution not to seek the death penalty. But once again, since no agreement was ever reached between the parties in this case and the offer of leniency was not outstanding, petitioner's rights were not violated by the prosecutor's decision to request a special sentencing hearing.

The facts of this case as discussed throughout respondent's brief reveal that no trickery was employed by law enforcement officials to induce petitioner to forfeit his rights in the absence of counsel. The prosecutor and the police officers were straightforward at all times and petitioner apparently did not want the benefits of the State's offer. (A. 111, 123, 143) Therefore, review by this Court is not necessary.

IV.

THE ILLINOIS SUPREME COURT CORRECTLY DECIDED THAT THE ILLINOIS DEATH PENALTY STATUTE IS CONSTITUTIONAL.

Petitioner contends that two provisions of the Illinois death penalty statute, Ill. Rev. Stat., ch. 38, §§ 9-1(c)(2), (d) (1977), are unconstitutional. Respondent submits that the decision below, upholding the challenged

portions of the statute, does not merit review by this Court.

A.

The Statutory Mitigating Factor Of "Extreme Or Emotional Disturbance" Is Not Un-Constitutionally Vague.

The Illinois statute on murder and the death penalty provides, in part, as follows:

> (c) . . . Mitigating factors may include but need not be limited to the following:
>
> * * *
>
> 2. the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, although not such as to constitute a defense to prosecution . . . .

Ill. Rev. Stat., ch. 38, § 9-1(c)(2) (1977). Petitioner challenges this listed mitigating factor as unconstitutionally vague and claims that the phrase "extreme mental or emotional disturbance" does not sufficiently guide the sentencing authority. Respondent maintains that this factor does not violate any constitutional precepts.

The factor of extreme mental or emotional disturbance is one of five mitigating factors enumerated in the statute. Ill. Rev. Stat., ch. 38, § 9-1(c) (1) - (5) (1977). However, mitigating evidence is specifically not limited to these factors. Id.

The principles enunciated in this Court's decision in Gregg v. Georgia, 428 U.S. 153 (1976), make clear that this section of the Illinois statute here challenged by petitioner is constitutional. The Georgia statute required the sentencing authority, either judge or jury, after finding a statutory aggravating factor existed, to "hear additional evidence in extenuation, mitigation, and aggravation of punishment . . ." at the presentence hearing. Ga. Code Ann. § 27-2503 (Supp. 1975). Another section of the law required the sentencer to consider "any mitigating circumstances or aggravating circumstances otherwise authorized by law . . . ." Ga. Code Ann. § 27-2534.1(b) (Supp. 1975). The scope of the mitigating circumstances was not delineated in the statute. Yet this Court rejected the petitioner's objection to the

broad scope of evidence and argument permitted at the presentence hearing:

> We think that the Georgia court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such a hearing and to approve open and far-ranging argument. [Citation omitted.] So long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it is desirable for the jury to have as much information before it as possible when it makes the sentencing decision. [Citations omitted.]

Gregg, 428 U.S. at 203-4.

Respondent submits that the enumerated factor challenged here is clear on its face and can be easily applied to the evidence in a particular case. The factor of "extreme mental or emotional disturbance" is adequately limited by the language additionally describing it -- "although not such as to constitute a defense to prosecution." Further definition of this factor would impose unnecessary restrictions on the evidence.

If a statutory scheme that does not delineate mitigating factors is not found to be unconstitutional, then one which specifies certain factors, without limiting other mitigating evidence, is surely also not unconstitutional.

Petitioner's reliance on Godfrey v. Georgia, ___U.S.___, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), is misplaced. The death sentence was reversed there because the court below did not apply a constitutional construction of an aggravating factor to the particular facts of the case. Nothing in Godfrey mandates that mitigating factors be as strictly defined.

Nor does the Illinois mitigating factor of "extreme mental or emotional disturbance" conflict with the decision in Lockett v. Ohio, 438 U.S. 586 (1978). Ohio's death penalty statute was struck down because it unduly limited the consideration of mitigating factors. The listing of "extreme mental or emotional disturbance" as a mitigating factor does not preclude the sentencing authority from considering any other relevant mitigating evidence. When read as a whole, § 9-1(c) of the Illinois statute permits "the type of individualized consideration of mitigating

factors . . . [held] to be required by the Eighth and Fourteenth Amendments in captial cases." Id. at 606. Therefore, review by this Court is unwarranted.

B.

The Illinois Death Penalty Statute Is Valid As A Matter Of Federal Constitutional Law And Conforms With Prior Decision Of The Supreme Court.

Section 9-1 of the Illinois Criminal Code, Ill. Rev. Stat., ch. 38, § 9-1 (1977), establishes a separate sentencing procedure which must be employed before a death sentence is imposed. This additional hearing is conducted only "where requested by the State." Ill. Rev. Stat., ch. 38, § 9-1(d)(1977). Petitioner attacks § 9-1(d), claiming that a prosecutor has "unlimited" and "absolute" discretion to request a hearing and that such discretion violates the eighth amendment. Respondent submits that the decision below, rejecting this argument, is correct. That decision relied on the prior Illinois Supreme Court decision of People ex rel. Carey v. Cousins, 77 Ill.2d 531, 540-3, 397 N.E.2d 809, 814-5, (1979).

The substance of petitioner's constitutional claim was rejected by this Court in Gregg v. Georgia, 428 U.S. 153 (1976). Gregg involved an attack on the Georgia death penalty statute on the grounds that the Georgia procedures left to the "unfettered authority" of the prosecutor the decision as to which accused murders should be considered for capital punishment. This Court, in upholding the power of a local prosecutor to show mercy on a convicted murderer by not exposing him to a death penalty hearing, characterized this attack on prosecutorial discretion as being the product of a misinterpretation of Furman v. Georgia, 408 U.S. 238 (1972). Gregg, 428 U.S. at 199. See also Jurek v. Texas, 428 U.S. 262, 274 (1976); Proffitt v. Florida, 428 U.S. 242, 254 (1976). As the Court noted, there is nothing unconstitutional about a capital punishment statute which grants a prosecutor discretion to show mercy to an individual convicted of murder. Gregg, 428 U.S. at 199.

It is true that the opinion rendered in Furman refers to a need for standards so that the sentencing authority may focus on the particularized circumstances of the crime and of the defendant. See Gregg, 428 U.S. at 189. That need is satisfied by the Illinois statute which dictates that the judge or jury which sets the sentence must first consider a list of specific factors in aggravation and then a broad, open-ended list of factors in mitigation before finally determining punishment for the offender. Ill. Rev. Stat., ch. 38, §§ 9-1(b), (c) (1977). These factors provide specific, uniform standards to govern the imposition of captial punishment. But it is indisputable that a State's Attorney in Illinois, by charging the crime of murder and requesting the death penalty upon conviction, does not become a part of "the sentencing authority". That role is filled, under the statute, by either a judge or the jury.

This Court has, however, directly addressed the role that a prosecutor plays as an "actor" within the criminal justice system in seeking the imposition of capital punishment, by stating that:

> [t]he existence of these discretionary stages is not determinative of the issues before us. At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. Furman, in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense. Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. Furman held only, that in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the setencing authority would focus on the particularized circumstances of the crime and the defendant.

Gregg, 428 U.S. at 199.

Petitioner expresses a concern that the discretion which the statute grants to the State to request a special hearing will lead to arbitrary and capricious applications of the death penalty. He claims that "[i]t is inevitable that the personal beliefs or office policies of the 102

Illinois prosecutors will be the only basis of distinction between some of those on whom the death penalty is imposed and others who are passed over." Petition at 39. This attack on the integrity of the various State's Attorneys in Illinois is a misstatement of the law. The correct rule of law in Illinois is that it must be assumed that State's Attorneys will perform their duties in good faith and in accordance with the law. People ex rel. Hanrahan v. 1965 Oldsmobile, 52 Ill.2d 37, 284 N.E.2d 645 (1972), rev'd on other grounds, 409 U.S. 38 (1973).

Similarly, as a matter of federal constitutional law, the concurring opinion of Mr. Justices White, Burger and Rehnquist in Gregg, 328 U.S. at 224-25, specifically rejected as "untenable" the argument that prosecutors may utilize the death penalty to act out personal prejudice:

> Absent facts to the contrary it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts. Unless prosecutors are incompetent in their judgments the standards by which they decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilt and sentence. Thus defendants will escape the death penalty through prosecutorial charging decisions only because the offense is not sufficiently serious; or because the proof is insufficiently strong. This does not cause the system to be standardless any more than the jury's decision to impose life imprisonment on a defedant whose crime is deemed insufficiently serious or its decision to acquit someone who is probably guilty but whose guilt is not established beyond a reasonable doubt. Thus the prosecutor's charging decision are unlikely to have removed from the sample of cases considered by the Georgia Supreme Court any which are truly 'similar.' If the cases really were 'similar' in relevant respects it is unlikely that prosecutors would fail to prosecute them as capital cases; and I am unwilling to assume the contrary.

Likewise, an Illinois prosecutor, in requesting a death penalty hearing, will be motivated by the strength of his case. In Illinois there is only one offense of murder and "no distinction is made between capital and non-capital murder." People v. Brownell, 79 Ill.2d 508, 528, 404 N.E.2d 181, 189 (1980).

The fact that a prosecutor uses discretion at both stages of the bifurcated process, in deciding what offense to charge and whether to request a special hearing, does not render the process unconstitutional. The Illinois prosecutor's decision to request a death penalty hearing is similar to a Georgia's prosecutor's decision to charge a capital offense.

Furthermore, it is inaccurate to say that a prosecutor has no standards to rely upon in deciding when to request the death penalty procedure. In interpreting the statute, the Illinois Supreme Court has stated that "[u]nless the State's Attorney believes that there will be testimony which will persuade the jury that the requisite elements for a death sentence exist, he is unlikely to request a hearing." People ex rel. Carey v. Cousins, 77 Ill.2d 531, 543, 397 N.E.2d 809, 815 (1979). The statute lists seven separate factors in aggravation, at least one of which must be proven beyond a reasonable doubt before the penalty could be imposed. Ill. Rev. Stat., ch. 38, § 9-1(b) (1977). Thus the prosecutor, as is true of any litigant, is aware of what facts must be present and which burden of proof must be satisfied before he could successfully request capital punishment. The statute itself serves as the guide in determining which cases are appropriate for death penalty consideration.

Petitioner cites cases to this Court which, he claims, exhibit "discrepancies among local prosecutorial practice." Petition at 40. This is a highly speculative conclusion, not based on facts in the record. Nothing petitioner has presented indicates that the prosecutors' decisions in the cases he referred to were based on mere whim or caprice. Prosecutors, in deciding whether to request a death penalty hearing, are not precluded from considering the weight of mitigating factors they anticipate a defendant will present.

Respondent submits that the Illinois Supreme Court properly decided that the prosecutor's discretion to reqeust a sentencing hearing is sufficiently guided. Therefore, further review by this Court is unnecessary.

CONCLUSION

For all these reasons and because this case is not ripe for review, the petition for a writ of certiorari should be denied.

Respectfully submitted,

TYRONE C. FAHNER
Attorney General
State of Illinois

MELBOURNE A. NOEL, JR.,

CAROLYN B. NOTKOFF,
Assistant Attorneys General
188 W. Randolph Street (Suite 2200)
Chicago, Illinois 60601
(312) 793-2570

Counsel for Respondent

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NO. 80-5122

IN THE

SUPREME COURT OF THE UNITED STATES

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CURTIS BROWNELL, Petitioner,

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

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ON PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF ILLINOIS

PETITIONER'S REPLY BRIEF

Mary Robinson, Deputy Defender
Mark Schuster, Assistant Defender
Office of the State Appellate Defender
63 Douglas Avenue
Suite 300
Elgin, Illinois 60120
(312) 695-8822

COUNSEL FOR PETITIONER

1D

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TO THE SUPREME COURT OF ILLINOIS

PETITIONER'S REPLY BRIEF

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3). Even though the Illinois Supreme Court, as respondent notes, has vacated the sentence of death for petitioner's murder conviction, the Court affirmed the penitentiary sentences imposed for the rape and aggravated kidnapping convictions. Because the convictions for rape and aggravated kidnapping depend upon the confession, at issue in this petition, the questions regarding the confession are ripe. Because petitioner maintains that both the original decision to seek the death penalty, and the Illinois Supreme Court's decision to remand the case for reconsideration of the death penalty, were constitutionally improper, petitioner believes the questions he has raised regarding the death penalty are also ripe.

REASONS FOR GRANTING THE WRIT

I.

THE INTERROGATION OF PETITIONER VIOLATED MICHIGAN V. MOSLEY AND RHODE ISLAND V. INNIS.

The State of Illinois, respondent in this case, has argued that petitioner's right to silence and right to counsel were not encroached upon and that the actions taken by the State during the evening of April 1, 1978 do not violate Innis. (Brief in Opposition, p. 7) Among these actions, respondent concedes, was an offer to forego the death penalty if petitioner would give a statement. Respondent argues, however, that the record makes clear that this "was not an open-ended offer but limited to 'that time, right now.' (A. 122)" (Brief in Opposition, p. 8)

Several factors undo this assertion. First, this description of the offer is made by only one witness, a policeman who merely overheard the purported offer as it was made to defense counsel. No other witness described the offer in limited terms. Specifically, petitioner understood the offer was simply that should he confess, the death penalty would not be requested. (C. 373) Another police officer understood the offer in similar general terms: if petitioner would give a statement the State would not seek the death penalty. (C. 309)

Second, the fact that the petitioner was clearly allowed more time to consider the offer (C. 346, 356, 373) after he first refused to give the statement (C. 276, 324, 355), is evidence that the offer was open-ended.

Thirdly, strict rules of offer and acceptance do not govern the situation, in any event. Brewer v. Williams, 430 U.S. 387, 401 n. 8 (1977). The defendant understood the offer to be open-ended and its import was surely such that the police should have known it was likely to induce a confession. It thus constituted interrogation under the Innis standard; and such interrogation violated the scrupulous honoring of petitioner's right to cut off questioning required by Mosley.

II.

PETITIONER'S RIGHT TO COUNSEL WAS NOT PROPERLY OBSERVED IN THIS CASE.

Respondent has argued that petitioner effectively waived his right to counsel before confessing after a previous request for and consultation with his lawyer. (Brief in Opposition, p. 9-10) Petitioner stands on his original contention that the State deliberately created a situation likely to induce petitioner to make an incriminating statement without the presence of counsel. Despite the efforts of respondent State of Illinois to distinguish United States v. Henry and United States v. Morrison, the principle of these two cases stands for petitioner against the State: the State may not engage in a deliberate interference with the right to the assistance of counsel.

In Henry, the government intentionally created a situation, by the use of a paid informer, very likely to induce Henry to incriminate himself outside the presence of his lawyer. This principle is not confined to the facts in Henry, including the use of an undisclosed informer, as the state intimates. (Brief in Opposition, p. 11)

In Morrison, government agents deliberately attempted to destroy the existing attorney-client relationship between Morrison and her lawyer. Morrison did not involve "repeated forceful and willful intrusions by government agents into a defendant's home," as the State asserts (Brief in Opposition p. 11), but did involve face-to-face efforts by agents to persuade Morrison to fire her lawyer in order to better cooperate with them to gain a favorable sentencing recommendation. Morrison, 602 F. 2d at 530-531. These facts led the Court of Appeals to denounce as "thoroughly unjustified and wrongly motivated" the interference with the attorney-client relationship. Morrison, 602 F. 2d at 533. The facts in this case, revealing efforts by the State to induce petitioner to fire his lawyer, in order to confess to gain a sentencing benefit, are similarly egregious and require review by this Court.

III.

A PROSECUTOR, HAVING OBTAINED PETITIONER'S CONFESSION, MAY NOT ABSENT GOOD REASON THEN REQUEST A DEATH SENTENCE HEARING AFTER PROMISING NOT TO DO SO IF PETITIONER WOULD CONFESS.

Respondent asserts that petitioner places "great emphasis" on Santobello v. New York, a case which is wholly "inapposite." (Brief in Opposition p. 12) For all the reasons stated in his original petition, petitioner reiterates that Santobello, along with Beck v. Alabama, make clear that fundamental fairness has been breached in this case. Because constitutional principles and not rules of contract law must govern this case, Brewer v. Williams, 430 U.S. 387, 401 n. 8 (1977), Santobello is entitled to great emphasis on this question.

The State also asserts that "there is nothing inherently unconstitutional about negotiations between the State and the accused" over constitutional rights. (Brief in Opposition p. 12) Although this principle is generally true, it does not account for an Illinois prosecutor's bargaining directly with his absolute discretion to request a death sentence hearing. Such bargaining lays bare the prosecutor's decision that his proof is insufficiently strong to seek the ultimate punishment, or that his determination that society's need for additional evidence against a defendant outweighs society's need to put him to death. For the reasons argued in the original petition, pp. 29-30, this factor requires that the death sentence be precluded in this case.

IV.

THE MITIGATING FACTOR "UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE, ALTHOUGH NOT SUCH AS TO CONSTITUTE A DEFENSE TO PROSECUTION," IS UNCONSTITUTIONALLY VAGUE.

Respondent asserts that the "extreme mental or emotional disturbance" mitigating factor is "clear on its face and can be easily applied to the evidence in a particular case," discounting petitioner's use of the Godfrey and Lockett opinions of this Court. (Brief in Opposition p. 14) Godfrey reiterates the principle that there must be clear and objective standards to provide specific and detailed guidance to the sentencer's exercise of discretion.

Godfrey, 100 S.Ct. at 1764-1765. That these maxims apply to the entire capital sentencing process, covering both aggravating and mitigating evidence, is the contention advanced in this petition. Such principles must be conjoined with the rule of Lockett v. Ohio, 438 U.S. 586 (1978), that mitigation not be unduly limited, so that there be no risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.

The danger with the "extreme mental or emotional disturbance" factor is that no guidance is provided by the statute or has been furnished by the courts as to how to adjudge whether this statutorily prescribed factor is present in a given case. A narrow reading of the statute, such as the one rendered in this case, tends to defeat the aims of properly channeling the sentencer's exercise of discretion, and an offender's broadening opportunity to show mitigation. The conditional reading of the factor by the sentencing judge in this case, dependent on proof of an identifiable triggering event (R. 577), resulted in the finding that no extreme disturbance existed. This finding deprived petitioner of the weighing of this mitigating factor in the decision that he be sentenced to death; yet no part of the statute or any case law calls for such a conditional interpretation.

Petitioner does not contend that the mitigating factor be "strictly defined," as the respondent suggests he does. Petitioner rather asserts that the meaning of this factor must be established by some clear and objective guidelines for all the Illinois sentencers who must decide its existence case by case. Such guidelines will eliminate arbitrary rejection of the existence of this mitigating factor.

For these reasons and all the reasons set forth in the original petition, petitioner asks this Court to issue its writ of certiorari on this question.

V.

THE STANDARDLESS POST-CONVICTION DISCRETION TO REQUEST OR WAIVE THE DEATH PENALTY VESTED IN ILLINOIS PROSECUTORS UNDER THE ILLINOIS DEATH PENALTY STATUTE VIOLATES THE EIGHTH AMENDMENT.

Respondent accuses petitioner of attacking "the integrity of

the various State's Attorneys in Illinois," in asserting that the personal beliefs or office policies of the many prosecutors will play a role in requesting or waiving the death sentence. (Brief in Opposition p. 16) It must be noted that the suggestion originated with a Justice of the Illinois Supreme Court, as set out in the original petition, p. 39; and that the belief is based not on any disrespect for Illinois prosecutors but on the unbridled grant of discretion made in the statute. Thus, the acute problem here is that the Illinois Death Penalty Act equally allows a prosecutor to either request or waive the special sentencing hearing in good faith and accordance with the law. Even assuming, then, that Illinois prosecutors always act in accord with the law, the law imparts such unbridled discretion to State's Attorneys that they may do as they wish. In this setting, it is "inevitable" that the personal beliefs of Illinois prosecutors will play too large a role in the imposition, or not, of the death penalty.

For all the reasons stated in the original petition, this is insufficient guidance to prevent arbitrary imposition of the death penalty in Illinois. Petitioner asks that a writ of certiorari issue to review this question.